Supreme Court, U.S.
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01-420 SEP - 6 2001
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No. 01-

IN THE

# Supreme Court of the United States

WILLIAM G. FLANIGAN, Individually and on behalf of all others similarly situated, *et al.*,

*Petitioners,*

*v.*

GENERAL ELECTRIC CO., *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Former long-service employees of the Aerospace business of General Electric Company, who were affected by the sale of that business to a new employer, complain of several violations of ERISA's fiduciary, prohibited transaction, and other provisions by their former employer and the acquiring company. They claim that they were induced to retire or resign prematurely due to involuntary transfer of their pension accounts and uncertainty about the benefits they would receive with their new employer, and that the new employer unlawfully denied to employees who did transfer important early retirement pension benefits that protected them in case of the job losses and plant closings they later experienced.

The questions presented are:

1. Whether ERISA's fiduciary duty rules require the dissemination of complete, accurate and timely benefits information to employees who have been offered employment by a new employer as part of a business divestiture, or, instead, ERISA provides no disclosure protections to these employees and this area is left unregulated by both federal and state law?

2. Whether ERISA's rule prohibiting cutback of accrued pension benefits protects the early retirement benefits afforded to long-service employees in the event of job loss that had become a permanent feature of their pension plan or, instead, ERISA permits employers to circumvent the anti-cutback rule by purporting to insert expiration dates in the descriptions of these benefits?

3. Whether ERISA's strict prohibited transaction and fiduciary duty rules govern employers making pension plan asset transfers or, instead, ERISA permits employers to misappropriate protected plan assets by selling surplus assets to another firm and pocketing the resulting proceeds for themselves?

## LIST OF PARTIES

Petitioners are current and former employees of the Aerospace Division of General Electric Company who were participants in the GE Pension Plan, a voluntary, contributory defined benefit pension plan governed by ERISA. The named plaintiffs in the certified class action below who are interested in the questions presented, and who are Petitioners here, are: William G. Flanigan, Roger L. Pape, David J. Osterhout, Marvin F. Sedlacek, Alan R. Saydah, Joseph E. Leone, Stephen Loughin, Donald R. Bloyer, Joseph G. McGuire, Melvin L. Gilbert, Barbara A. Tobler, Joseph M. Belmont, Richard R. Ducko, Anna M. Marco, Vernon W. Wagner, and Carol A. Moody, acting individually and on behalf of all other similarly situated class members. Named plaintiffs Mark H. Trzyzewski, Stephen J. Smith, and David P. Cranston were listed as appellants in the court below but they do not have a personal interest in the issues raised by the Petition and are not Petitioners in this Court.

Respondents, who were defendants and appellees in the courts below, are: (a) General Electric Company ("GE"), Petitioners' former employer and the sponsor and a fiduciary of the GE Pension Plan; (b) individual defendants Dale F. Frey, Michael J. Cosgrove, John H. Myers, Joel R. Wilson, Arthur S. Bahr, Alan M. Lewis, Eugene K. Bolton, and Donald W. Torey, who were officers of GE and additional fiduciaries of the GE Pension Plan; and (c) Lockheed Martin Corporation ("Martin"), successor to Martin Marietta Corporation, the employer of the transferred employees and the sponsor, administrator and a fiduciary of the benefit plans covering the transferred employees.

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This case is a certified class action brought on behalf of former employees of the Aerospace Division of Respondent General Electric Company ("GE"). In April 1993, GE sold the division to Martin Marietta Corporation (now Respondent Lockheed Martin Corporation). The sale and ensuing developments raised several issues relating to the benefits these employees would receive after the transfer of their employment to Martin and the use and disposition of pension plan assets attributable to them.

The district court dismissed certain of Petitioners' claims pursuant to Fed. R. Civ. P. Rule 12(b)(6) in 1996 and 1997, *see* 122a-139a, 102a-121a, and the balance of the claims by grant of summary judgment in March 2000, *see* 21a-101a. In a published opinion dated March 2, 2001 (per Judge McLaughlin, joined by Judges Kearse and Winter), the Second Circuit affirmed the district court in all respects. 1a-20a.

This Petition seeks review by the Court of three aspects of the lower court's decision. First, the court of appeals affirmed the summary judgment ruling that employees who have been offered employment by a new employer as part of a business divestiture are not protected by ERISA's fiduciary requirement that the employer provide accurate and timely information about their benefits with the new company, because the employees had not yet begun working for it. 11a-12a.

Second, the court affirmed without explanation the district court's ruling on a motion to dismiss that early retirement benefits available to long-service employees in the event of job loss, which had become permanent features of the pension plan, were not protected by ERISA's anti-cutback rule because they were "renewed" periodically by the employer. 20a.

Third, the court affirmed the district court's ruling on a motion to dismiss that ERISA's strict fiduciary and prohibited transaction rules do not govern wrongdoing in connection with a pension plan asset transfer. According to the court, GE was permitted to sell surplus plan assets to Martin as part of the transaction and keep for itself the consideration paid for this plan property. 16a-19a.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated March 2, 2001, is reported at 242 F.3d 378 (2d Cir. 2001), 2001 U.S. App. LEXIS 3244, and 25 EBC 2237. The opinion is reprinted in the attached Appendix at 1a-20a. The June 8, 2001 order denying the petition for rehearing and rehearing *en banc* appears at 140a-141a.

The decisions that were reviewed by the court of appeals are: (1) the March 29, 2000 summary judgment ruling by the U.S. District Court for the District of Connecticut, which is reported at 93 F. Supp. 2d 236 (D. Conn. 2000), 2000 U.S. Dist. LEXIS 6270, and reprinted in the Appendix at 21a-101a; (2) that court's September 30, 1997 ruling granting in part renewed motions to dismiss, which is reported at 1997 U.S. District Court LEXIS 23741 (D. Conn. Sept. 30, 1997) and reprinted in the Appendix at 102a-121a; and (3) that court's September 26, 1996 transcribed oral ruling granting in part motions to dismiss, which is not reported and which is reprinted in the Appendix at 122a-139a.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered March 2, 2001. Petitioners timely sought rehearing and rehearing *en banc*. The petition was denied by order dated June 8, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The relevant statute is the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001, *et seq*. The portions of the statute which are pertinent to this Petition are ERISA §§ 3(7), 204(g), 404(a), and 406, which are codified at 29 U.S.C. §§ 1002(7), 1054(g), 1104(a), and 1106. These provisions appear in the Appendix at 142a-147a.

## STATEMENT OF THE CASE

### A. Statement of the Facts

This case arises out of the 1993 sale of the GE Aerospace business to Martin. The transaction was first announced on November 23, 1992 and was consummated on April 3, 1993. Pursuant to their sale agreement, GE and Martin agreed that GE would cause the GE Pension Plan to transfer to Martin pension assets to cover the employees who transferred to the payroll of Martin plus a defined portion of actuarially-defined "surplus" assets. This involuntary pension transfer and the lack of information about Martin plans induced many of the most senior employees to retire or resign from employment.

#### 1. Facts Pertinent to the Claim that GE and Martin Violated ERISA Fiduciary Rules by Withholding Timely and Complete Benefits Information from Transferring Employees

Petitioners claimed that GE and Martin violated ERISA fiduciary duties and disclosure obligations by withholding timely and complete benefits information from employees who were considering whether to transfer to Martin. This claim was dismissed on summary judgment in March 2000.

68a-83a. The pertinent facts are those set forth in Petitioners' Statements of Material Facts filed pursuant to District of Connecticut Local Rule 9(c)(2). These facts are summarized as follows:

The November 22, 1992 Transaction Agreement for the sale of GE Aerospace provided that each existing employee was offered employment to commence on the Closing Date of the transaction. The Agreement also provided that Martin would provide the employees "substantially similar" benefits plans.

Immediately upon announcement of the sale, and during the four months preceding its closing, defendants repeatedly promised the employees that they would receive prompt disclosure of material information about the benefits that Martin would provide. GE and Martin nevertheless proceeded to withhold the promised information, even though the facts were in their possession and they knew that withholding them was causing uncertainty and anxiety among the employees, leading many to retire or resign in advance of the closing date.

Defendants knew from the time their Transaction Agreement was executed that Martin had no practical alternative to continuing the exact same GE benefits, because it was impossible for Martin to design, implement and arrange for delivery of benefits under new plans within the limited time before the closing.

Key personnel also confirmed that Martin never even considered altering any substantive benefits offered by GE's existing pension and insurance plans; nor did they ever encounter any circumstance that would have led them to consider any changes. From the earliest transition work in early December 1992, the companies' own documents and

testimony show that they shared an understanding that Martin would continue to offer the exact same benefits as GE and that Martin had decided to make no changes to virtually all of the benefits for the post-closing transition period.

By the end of December 1992, agendas regularly exchanged by the companies reflected the "planning assumption" that "MMC benefit plans same as GE (except savings plan)." Planning documents from early January 1993 also reflect the unambiguous statement, "MMC has agreed to provide pension and insurance benefits which are the same as GE's for the balance of 1993, except for the savings plan."

Even though the companies repeatedly assured the employees that they would receive complete benefits information as soon as it became available, and even though they had detailed information by December 1992 about what benefits would not be changed, the companies did not disclose this information to the employees. Rather, they issued a series of joint communications, including a periodic bulletin, *Teaming Update*, repeatedly characterizing the post-merger benefits package with vague terms such as "generally comparable," "substantially similar" or "essentially the same" as the package offered by GE. Responsible GE officials admitted that such terms would *not* be understood to be synonymous with "identical" and were open to varying interpretations.

The companies persisted in using these vague characterizations even though they knew that they were generating uncertainty and anxiety among the employees. The companies understood the importance of providing disclosure of specific benefits information to enable the employees to make critical life decisions, such as whether to retire or otherwise terminate employment in advance of the closing date. They repeatedly reminded the employees

that, if they wanted to retire with GE benefits, they had to effect their retirements before the closing date, which was initially projected to be February 26.

Responsible GE officials admitted that the features of the post-closing benefits package should have been announced at least a month in advance of the closing. But, in fact, the companies waited until March 24, 1993 – just seven days before the closing – to disclose detailed information about post-merger benefits in their joint communication bulletin. Their witnesses admitted that there was no reason why this information could not have been disclosed earlier.

When the companies finally did disclose what they had known for months, it was too late to be of use to employees who already had been forced make their critical decisions about whether to transfer, or pursue retirement or other separation, without this benefits information.

### 2. Facts Pertinent To The Claim for Unlawful Cutback of Pension Benefits

Petitioners claim that Martin violated ERISA's prohibition against cutback of accrued pension benefits when it terminated the special early retirement benefits protecting long service employees in the event of layoff or plant closing. This claim was dismissed pursuant to Rule 12(b)(6) in September 1997. 118a-121a. The pertinent facts are those alleged by Petitioners.

The employees accrued Special Early Retirement Option ("SERO") pension benefits, which allowed employees who were as young as age 55 and who had at least 25 years of service to retire with an unreduced pension when they lost their jobs because of a layoff, plant closing, work transfer,

or reduction in force. The employees also accrued Plant Closing Pension Option ("PCPO") pension benefits, which allowed employees who were as young as age 50 and who had the specified years of service to retire with an unreduced pension when they lost their jobs because the company closed the plant, service shop or other facility where they worked.

Since their introduction to the GE Plan, the descriptions of these benefits have contained purported expiration dates corresponding to the duration of three-year collective bargaining agreements covering some unionized employees. However, these benefits have routinely been renewed over the years and have never been withdrawn. After employees transferred to Martin in April 1993, the Martin "Trans Ops" Pension Plan also continued these benefits without change. In July 1994 the SERO and PCPO benefits in the GE Plan were once again renewed to July 1, 1997.

Effective for retirements occurring after January 1, 1995, however, Martin eliminated the SERO and PCPO pension benefits. As a result, all employees who were laid-off or terminated from employment with Martin since late 1994 were denied the accrued early retirement SERO and PCPO pension benefits to which they were entitled. Martin did not offer comparable benefits in their place. Terminated employees received only reduced severance pay and unemployment insurance (if not able to retire). Other terminated employees who were over age 55 were only eligible to receive pension benefits and supplements that were significantly reduced for each year under age 60.

### 3. Facts Pertinent To The Claim for Prohibited Transaction and Fiduciary Violation in the Pension Asset Transfer

Petitioners' claim that Respondents' pension plan asset transfer violated ERISA's prohibited transaction and fiduciary rules was dismissed pursuant to Rule 12(b)(6) in 1996. 123a-126a. The pertinent facts are those alleged by Petitioners.

In connection with the sale, GE Aerospace employees and certain assets of the GE Pension Plan were transferred to Martin. To preserve their rights under the pension plan, the employees were left with the dilemma of either staying in the plan, by taking early retirement or otherwise giving up their jobs, or by going to work for Martin and keeping their jobs, but thereby losing their rights to stay in the superior pension plan and other benefits plans of GE.

Participation in the GE Pension Plan was voluntary. Since 1987, GE had not been permitted to make any contributions to the Plan and employees alone contributed to the Plan. A significant portion of the Plan assets, then totaling approximately twenty-six billion dollars, is attributable to employee contributions. The Plan had an actuarial surplus of almost ten billion dollars (as of March 1993). The Plan expressly provided that no plan assets could ever revert to GE or any successor employer.

Under the Plan terms in effect at the time the sale was announced, employees of a business unit that was divested to a successor employer could maintain their participant status in the GE plan. After previous divestitures, GE employees had been allowed to maintain participation in the Plan. According to the Plan, employees had the right to elect to leave their contributions in the Plan and retire from the

Plan when otherwise eligible. Notwithstanding these terms, GE, the Plan Administrator and a fiduciary, did not allow Petitioners or any other transferring employees to maintain participant status in the Plan.

By directing the involuntary transfer of pension accounts, GE acted in its own business interests in order to enable it to confer a substantial economic benefit on Martin by using protected pension assets, which then permitted GE to receive a higher price for the sale. The pension transfer was the means for GE to accomplish a pension asset reversion that was forbidden under the non-reversionary terms of the Plan.

**B. District Court Proceedings.**

The employees filed their initial class complaint on March 12, 1993. The district court's jurisdiction was based on the federal questions presented by the claims under ERISA. *See* 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). On March 22, 1993, the employees filed a motion for preliminary injunction to require the companies to refrain from compelling transfer of any employee's participant status in the GE Plan until adequate information had been disseminated about the terms of the Martin plans. On the afternoon of Wednesday, March 31, 1993, while the district court was considering the motion for preliminary injunction, GE and Martin announced the adoption of a 56-day "Window Period" during which transferring employees could opt to retire or resign and preserve participation in the GE Plan. The court accordingly ruled that the Window Period provided the interim relief the employees requested and denied the motion for preliminary injunction. The Window Period, however, was not available to any employee whose retirement or resignation had already taken effect.

In 1996 and 1997,[1] the district court issued decisions on two rounds of motions to dismiss, directed to the initial and then amended complaints. Following discovery on the three remaining claims, the court granted summary judgments dismissing the claims.

Respondents' motions to dismiss directed to the initial complaint were decided by the district court in an oral opinion rendered following argument on September 26, 1996. 122a-139a. The court granted the motion to dismiss directed to claims that the GE defendants, by causing the Plan asset transfer and the concomitant payment to GE by Martin for those assets, committed a breach of fiduciary duties under 29 U.S.C. § 1104 and a prohibited transaction under 29 U.S.C. § 1106. The court ruled that the plan asset transfer was governed solely by the minimum transfer amount rule of ERISA § 208, 29 U.S.C. § 1058, and hence that neither GE nor Martin could have any liability for any aspect of the pension asset transfer so long as a minimally sufficient amount of assets was transferred. 123a-126a. Among other rulings, the court also denied motions to dismiss the claim for fiduciary violations in failing to provide benefits information. 128a-131a.

The employees filed their amended complaint in October 1996. Both the GE defendants and Martin filed Rule 12(b)(6) motions to dismiss, and the district court ruled on the motions by a memorandum opinion dated September 30, 1997.

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1. Due to the backlog caused by judicial vacancies in the District of Connecticut, this case was unduly protracted. District Judge Janet Bond Arterton, who made all of the pertinent merits rulings in the case, was the third judge assigned to the case. The first assigned judge issued a stay of discovery pending a decision on the initial motions to dismiss, and the employees' subsequent requests to lift the stay of discovery were denied. As a result, no progress could occur in the case between June 1993 and September 1996, when the court finally ruled on the initial motions to dismiss.

102a-121a. The court again denied motions to dismiss insofar as they attacked the claim of fiduciary violations in failing to provide benefits information. 106a-110a. Among other rulings, the court's 1997 opinion granted Martin's motion to dismiss the claim that it had violated ERISA's "anti-cutback" rule, 29 U.S.C. § 1054(g) and 26 U.S.C. § 411(d)(6), which protects accrued pension benefits from elimination, due to its termination effective January 1, 1995 of the significant Special Early Retirement Option (SERO) and Plant Closing Pension Option (PCPO) benefits. These benefits enabled long-service employees who lost employment due to layoffs or plant closings to commence their pension benefits without actuarial early retirement reductions. Although the court acknowledged that ERISA "is intended to prevent employers from making their pension plans 'works in progress' such that any time an employee is approaching the stage at which a benefit is due to him or her, the plan changes and the benefit disappears," the court determined that these specific benefits were not legally protected because they had "expired and had to be affirmatively renewed" by the employer. The court cited no caselaw, regulations, or other materials for its conclusion. 118a-121a.

By memorandum opinion dated September 28, 1998, the court granted Petitioners' motion for class certification of pending claims under Fed. R. Civ. P. 23(b)(1). The class was defined as consisting of two subclasses. Subclass One, asserting the claim of fiduciary violations in failing to adequately disclose benefits, consisted of all former GE Aerospace employees who retired or resigned between the announcement of the sale and its closing. Subclass Two, asserting claims for fiduciary investment violations and partial termination of the Martin plan, consisted of all employees of GE Aerospace who transferred employment to Martin Marietta.

Following completion of fact and expert discovery in early 1999, the court entertained motions for summary judgment. All defendants moved for summary judgment on the three pending claims, including the claim that the companies violated their ERISA fiduciary duties by withholding timely benefits information.

By memorandum opinion dated March 29, 2000, 21a-101a, the district court granted the motions for summary judgment. With respect to the employees' claim that GE and Martin had breached their ERISA fiduciary duties by failing to provide complete and timely information about the benefits the employees would receive from Martin, the court ruled that, despite substantial evidence of the violation, the claim should be dismissed. First, with respect to Martin's liability, the court ruled that since the employees who retired or resigned never actually became employees of *Martin*, they could not satisfy the ERISA definition of "participant," even though "they were as close to being Martin employees as they possibly could be," and thus Martin did not owe them any ERISA fiduciary duties. 68a-72a. With respect to GE's liability, the court determined that the record would present triable issues were Martin otherwise potentially liable, 78a-79a, but that GE itself "had no control over the benefits that Martin would provide" and (despite record evidence that Martin had no alternative but to offer the same benefits) GE could not have told this to the employees due to the theoretical possibility of some later change. The district court acknowledged that its construction of ERISA duties placed the employees in a "Catch-22" with resulting "unfairness" but it believed the statute compelled this result. 81a.

A final judgment was entered in favor of Respondents on all claims on March 30, 2000. Petitioners noticed timely appeals to the Second Circuit on April 27, 2000.

**C. Second Circuit Proceedings.**

The Court of Appeals for the Second Circuit, which had jurisdiction under 28 U.S.C. § 1291, rendered its decision on March 2, 2001, in an opinion authored by Judge McLaughlin and joined by Judges Kearse and Winter. 1a-20a.

The court of appeals affirmed the district court rulings in all respects. First, with respect to Petitioners' claim that the companies breached their fiduciary duties by withholding timely information about benefits that had already been decided by the companies, the court affirmed the summary judgment ruling dismissing this claim. 7a-12a. The court reasoned that GE had disclosed adequate information that it knew, even if it provided only partial benefits information, and that its disclosure of all benefits information one week before the closing (but fifteen weeks after the companies had decided that Martin would offer the same benefits) was sufficient to satisfy ERISA. 8a-11a. The court also ruled that because the employees were not in "currently covered employment" with Martin and the Martin plans were not yet in effect, Martin itself had no duty to disclose to the employees any of the information about the benefits decisions it had made. 11a-12a.

With respect to the claim that the pension plan asset transfer violated ERISA fiduciary and prohibited transaction rules, the court affirmed the dismissal of the claim under Rule 12(b)(6). 16a-19a. The court ruled that "fiduciary duty and prohibited transaction rules apply only to decisions by an employer acting in its fiduciary capacity." 17a. Conceding that the claim presented an issue of first impression in the circuit, the court nevertheless read this Court's decisions in *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999), and *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996),

to insulate all aspects of the pension asset transfer from ERISA scrutiny because it was a "corporate business decision." The court believed that the actions of GE and the other plan fiduciaries to effect the transfer of plan assets and thereby obtain and keep consideration for those assets did not trigger ERISA fiduciary duties. 17a-18a. In addition, because the financial benefits obtained by GE were "indirect," the transfer did not implicate the anti-inurement rule of ERISA § 403, 29 U.S.C. § 1103. 18a. The court did not discuss the prohibited transaction claim, other than in its erroneous conclusion that the prohibited transaction rules only applied to decisions by an employer acting in a fiduciary capacity. 17a.

The court summarily affirmed the dismissal of other claims presented by Petitioners, including the claim for unlawful cutback of accrued early retirement benefits. 20a.

## REASONS FOR GRANTING THE WRIT

The Court should grant review in this case. *First*, the court of appeals has made an unprecedented ruling that ERISA affords no protection to employees who are awaiting transfer to a successor employer in connection with a business divestiture, where the employer withholds important benefits information from them in violation of fiduciary duties. Contrary to the Court's ruling in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and other circuit court decisions, the lower court ruled that these employees have no protections under ERISA and that benefits misrepresentations are not actionable because the new employer was not yet an actual employer and the new plans were not yet in effect. *Second*, the lower court continues a conflict among the circuits on the question whether ERISA's "anti-cutback" rules prohibit curtailment of valuable early retirement benefits that protected long-service employees who lost their jobs due to a plant closing or layoff. Under the lower court's ruling, the statute can be readily evaded through the simple device of adding

purported "expiration dates" to descriptions of protected benefits. *Finally*, the lower court has granted free rein to employers to misappropriate plan assets under cover of business divestitures, establishing a roadmap for all plan sponsors to evade ERISA's strict rules against prohibited transactions.

Review is warranted to secure lower court compliance with this Court's decisions, to resolve conflicts among the circuits, and to ensure fulfillment of ERISA's intended protective purposes and comprehensive application.

## I. THE DECISION BELOW CONFLICTS WITH DECISIONS BY THIS COURT AND DEEPENS A CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER ERISA'S FIDUCIARY PROVISIONS PROTECT EMPLOYEES WHO HAVE NOT YET BEGUN PARTICIPATING IN A NEW PLAN.

Petitioners claim that both GE and Martin committed fiduciary violations by failing to provide complete and timely information about the terms of the Martin benefit plans for transferred employees until one week before the transfer. The disclosures came too late because Respondents' unjustified 15-week delay in providing this necessary information and the resulting uncertainty among employees already had induced many of them to retire or resign.

The lower court affirmed the summary judgment ruling that Martin, despite having made an unqualified offer of employment to all of the employees and having undertaken to communicate some benefits information to them, was not governed by ERISA's strict fiduciary duties and was free to withhold material information that the employees needed to make critical decisions about whether to transfer. 11a-12a.

Although the evidence supporting this claim was not recited by the lower court, the record established that the companies knew at the time of their November 1992 Transaction Agreement that Martin had no alternative to continuing the exact same GE benefits because it was impossible to design and implement new plans. Key Martin personnel confirmed that Martin never considered altering any substantive benefits offered by GE's plans; nor did they ever encounter any circumstance that would have led them to consider any changes. From their earliest transition work in early December 1992, 15 weeks before the required disclosure was belatedly made, both companies understood that Martin would continue to offer the exact same benefits as GE, and that Martin had decided to make no changes to virtually all of the benefits for the post-closing transition period. The companies nevertheless withheld this information for months and instead persisted in vague characterizations about the new benefits even though they knew that this was generating employee anxiety and uncertainty. Company witnesses admitted that there was no reason why this information could not have been disclosed sooner.

The ruling below should be reviewed for several independently sufficient reasons.

First, the lower court's holding that the employees were not entitled to ERISA fiduciary protections is contrary to this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). The lower court accordingly erred in holding that there was no disclosure duty because there was no "plan in effect" and the employees were not yet on Martin's payroll. 11a-12a. In *Varity Corp.*, this Court made clear that benefits misstatements about new plans that are offered by either new or existing employers are actionable under ERISA despite the claimant's lack of current employment status. The Court

ruled that a violation of fiduciary disclosure duties occurred when a current employer induced its employees to transfer employment to a new affiliated employer and begin participation in its new benefit plans. 516 U.S. at 499-501. The employer was acting as an ERISA fiduciary in describing the new plans at the new company. *Id.* at 503-06. This conclusion followed even though the fiduciary misstatements occurred while the employees were only considering transfer, had not begun employment at the new company, and had not begun to participate in the new plans.

Second, the lower court decision deepens a conflict among the circuits on the question whether ERISA fiduciary protections apply to employees who, as a result of the fiduciary violations, never become participants in a new plan. Here, employees who retired or resigned due to lack of adequate benefits information would have transferred to Martin and become actual participants in the new benefits plans – if they had received timely and adequate disclosures. Under the law prevailing in the majority of circuits, a fiduciary cannot take advantage of its violation to defeat the standing of a plaintiff who would have attained participant status in the absence of the violation. *See McBride v. PLM Int'l, Inc.*, 179 F.3d 737, 743-44 (9th Cir. 1998); *Shea v. Esensten*, 107 F.3d 625, 628 (8th Cir. 1997); *Swinney v. General Motors Corp.*, 46 F.3d 512, 518-19 (6th Cir. 1994); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1220-23 (5th Cir. 1992); *contra: Raymond v Mobil Oil Corp.*, 983 F.2d 1528, 1536 (10th Cir. 1993): *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986). As the majority of circuits reason, depriving an employee of standing to prosecute a claim where the alleged ERISA violation itself caused the loss of participant status would frustrate the protective purposes of ERISA and reward the very wrongdoing that the statute seeks to deter and remedy.

Third, the lower court ruling applies statutory protections far too narrowly and depends upon an overly restrictive reading of the term "participant" to deny standing to employees who clearly are within the zone of interests protected by the statute. ERISA defines "participant" to refer to "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer. . . ." 29 U.S.C. § 1002(7), 142a. The Court ruled in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), that this term must encompass those who are reasonably expected to come into covered employment and benefits eligibility at a future time, such as through success on a colorable claim. "In our view, the term 'participant' is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment.' " 489 U.S. at 117. This reading comports with "Congress' purpose in enacting the ERISA fiduciary and disclosure provisions – ensuring that 'the individual participant knows exactly where he stands with respect to the plan.' " 489 U.S. at 118. These provisions accordingly must be understood to protect employees who are deciding whether to take action to become participants in a plan. Disclosure *after* a decision simply comes too late. The lower court ruling thereby contravenes *Firestone* and the circuit court decisions affording an appropriately broad scope to the statutory terms.

The courts have frequently noted that a principal legislative purpose of ERISA was to "remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities." *See Swinney*, 46 F.3d at 519, quoting S. Rep. No. 127, 93d Cong., 2d Sess. 47 (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4871. For the reasons stated, the lower court ruling overturns all of these precedents and creates an unacceptable void in ERISA protections for employees who are affected by business divestitures. If these disclosures are not governed by ERISA, but ERISA nevertheless

preempts state law regulation of conduct relating to benefit plan disclosures, then the alarming result of the lower court's ruling is that this conduct is left completely unregulated.

## II. THE DECISION BELOW THAT ERISA'S PROHIBITION AGAINST CURTAILMENT OF EARLY RETIREMENT BENEFITS FOR LONG-SERVICE EMPLOYEES CAN BE EVADED BY INSERTING PURPORTED EXPIRATION DATES INTO THE PLAN CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND AUTHORITATIVE INTERNAL REVENUE SERVICE REGULATIONS AND RULINGS.

Petitioners also claimed that Martin violated ERISA's prohibition against reduction of accrued retirement benefits when, effective January 1, 1995, it eliminated early retirement pension benefits protecting long service employees, *i.e.* the SERO and PCPO benefits that had been ongoing features of the GE Plan and that were continued in the Martin plan. The district court dismissed this claim in 1997 under Rule 12(b)(6) with little explanation, 118a-121a, and the court of appeals affirmed that cursory disposition without discussion. 20a.

ERISA § 204(g), 29 U.S.C. § 1054(g), 143a-144a, and its parallel tax code provision, IRC § 411(d)(6), expressly confirm that these early retirement benefits and retirement-type subsidies are protected by ERISA as "accrued benefits" and may not be cut back by an employer. Employees must have the opportunity to "grow into" eligibility conditions for early retirement benefits or subsidies even after they are reduced or eliminated. The benefits accrued up to that time are protected "with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy." ERISA § 204(g)(2), 29 U.S.C. § 1054(g)(2), 143a-144a.

The circuits are in conflict on the question whether these statutory protections apply to early retirement benefits that are conditioned on job loss events, such as the SERO and PCPO benefits. Two circuits agree that they are protected benefits, *see Bellas v. CBS, Inc.*, 221 F.3d 517 (3d Cir. 2000); *Harms v. Cavenham Forest Indust., Inc.*, 984 F.2d 686, 690-92 (5th Cir. 1993), while both the lower court and the Sixth Circuit, *see Ross v. Pension Plan for Hourly Employees of SKF Indus., Inc.*, 847 F.2d 329, 332-33 (6th Cir. 1988), have ruled that they are not protected and can be limited by so-called expiration dates.

The ruling below also contravenes controlling IRS regulations and rulings holding that these benefits are protected if, as the employees alleged in this case, the benefits have become a regular feature of the pension plan. Internal Revenue Service Rev. Ruling 92-66, 1992-2 C.B. 92, considers whether an employer's offer of several discrete, limited-time "window" early retirement programs created a protected benefit under Section 411(d)(6) and whether the employer was required to continue to offer the benefit earned to the date of its elimination to employees who retired later. The Ruling emphasizes that an employer's practice of offering periodic, limited time benefits does not deprive the benefits of protection: "[T]he regulations preclude a pattern of plan amendments that would make benefits available only for a limited period of time if the plan amendments give rise to a reasonable expectation that the benefit is an ongoing feature of the plan, and therefore a valuable right." Whether the employer has made a pattern of plan amendments entitling participants to continue to obtain the benefits is a question to be resolved on the basis of all the facts and circumstances.

> Specifically, Q&A-1(c)(1) of section 1.411(d)-4 of the regulations provides as follows: . . . "if an

> employer establishes a pattern of repeated plan amendments providing for similar benefits in similar situations for substantially consecutive, limited periods of time, such benefits will be treated as provided under the terms of the plan, without regard to the limited periods of time."

Rev. Ruling 92-66.[2]

These IRS authorities establish that employers cannot circumvent ERISA protections in the manner attempted by Martin. If inserting purported expiration dates were effective, then all employers would do so, "renewing" benefits or allowing them to "expire" when they chose to, thus making important benefits on which employees make significant life decisions a matter of "bait and switch" that would be illegal if it involved only a small consumer purchase. The rule cannot be different when benefits worth tens of thousands of dollars, paid for by the employees with their labor and direct pension plan contributions, are taken away just when they are needed.

Despite these contrary authorities, the lower court has now endorsed the view that the protections for these pension benefits defined in the statute, regulations and revenue rulings can be evaded by the simple expedient of inserting purported "expiration dates" in the descriptions of the benefits.

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2. The Internal Revenue Service is the principal enforcement agency for the anti-cutback provisions of ERISA. The cited Treasury regulation under IRC § 411 is expressly applicable to ERISA § 204. *See* 29 U.S.C. § 1202(c); 29 CFR § 2530.200a-2. Likewise, revenue rulings issued by the Treasury Department under IRC § 411 serve as guidance in interpreting ERISA § 204. *See Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1145 (3d Cir. 1993).

## III. THE DECISION BELOW THAT ERISA'S PROHIBITED TRANSACTION AND FIDUCIARY RULES DO NOT APPLY TO EMPLOYERS WHO MISAPPROPRIATE PLAN ASSETS UNDER COVER OF A BUSINESS DIVESTITURE RESTS ON A MISREADING OF THIS COURT'S DECISIONS AND CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

Petitioners claim that the companies violated ERISA's fiduciary duty and prohibited transaction rules by causing the GE Plan to make an asset transfer which enabled GE to illegally sell pension assets to Martin and compelled the employees to choose between pension plans due to the resulting denial of their stated right to remain in the GE Plan. The employees alleged that hundreds of millions of dollars of assets were taken from the plan, despite its permanent categorical prohibition against any reversion to the employer, and converted to GE's own use through the stratagem of the pension transfer. Although it was the plan that gave up these surplus assets as part of the transfer, GE garnered and kept the consideration Martin paid for these assets.

Until the lower court's ruling, it had been clear in that circuit and elsewhere that conversion of any assets from an employee pension plan is illegal and gives rise to criminal liability. *See* 18 U.S.C. § 664; *United States v. Santiago*, 528 F.2d 1130, 1135 (2d Cir. 1976) (diversion of welfare fund assets into union's general fund; "violation of the statute cannot be condoned simply because it is accomplished by indirect means").

In this case, however, the lower court sanctioned this conduct by ruling that pension asset transfers are not governed by ERISA fiduciary duties or prohibited transaction rules. The court's brief discussion of this claim, 16a-19a,

rests on the faulty conclusion that all aspects of a decision to transfer assets constitute a pure business, "settlor" decision that is completely insulated from ERISA scrutiny. Despite the fact that a transfer involves a disposition of massive amounts of plan assets – a core fiduciary function – the lower court concluded that fiduciary and prohibited transaction rules do not govern this conduct at all.

The decision below should be reviewed and corrected for several reasons. First, it misreads this Court's decisions as ousting ERISA jurisdiction over a wide range of transactions that are of utmost concern for ERISA plans. Safeguarding assets of ERISA plans and preventing misuse of these assets for improper gain are principal objectives of the statute and a focus of its fiduciary and prohibited transaction rules in particular.

In this case, Petitioners alleged facts showing that ERISA's strict fiduciary duties governed the transaction. The pertinent facts include: (1) no asset transfer was required; (2) the GE Respondents implemented the pension transfer to increase the purchase price received by the company from Martin and to avoid scrutiny by government defense contracting authorities; (3) the GE Respondents used the pension transfer to revert Plan assets to GE even though the Plan permanently barred any reversion; (4) employees had the right to elect to maintain their participant status in the Plan in the event of a divestiture; and (5) the GE defendants acted contrary to this right by instead making the involuntary pension transfer.

The transaction also was governed by the prohibited transaction rules of ERISA. ERISA § 406(a) bars a fiduciary from "caus[ing] the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect * * * (D) transfer to, or use by or for the

benefit of, a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D), 146a. Section 406(b)(1), in turn, bars any "fiduciary with respect to a plan" from "deal[ing] with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b)(1), 147a. Section 406(b)(3) bars a fiduciary from "receiv[ing] any consideration . . . in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(3), 147a. As alleged, the GE defendants were fiduciaries of the GE Pension Plan.

These prohibited transaction rules establish "bright line," per se standards forbidding certain transactions. These rules supplement general fiduciary standards by "*categorically barring* certain transactions deemed 'likely to injure the pension plan.' " *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 242 (2000) (emphasis added), *quoting Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993). The prohibited transaction rules therefore are read broadly and liability is imposed even in the absence of bad faith. *See id.* at 160 (expansive "construction of the statute's broad language is necessary to accomplish Congress' goal").

This Court has emphasized that ERISA's fiduciary duties "must be enforced with uncompromising rigidity." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981). But the lower court's decision now gives license to plan sponsors to deal with plan assets as they wish, without regard to these strict duties.

The decisions of this Court, misunderstood by the lower court as justification for its rule of immunity, actually underscore that ERISA's fiduciary duty and prohibited transaction rules unquestionably do apply in the circumstances of the pension asset transfer. In *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996), the Court

confirmed that fiduciary duties and prohibited transaction rules govern "uses of plan assets that are potentially harmful to the plan." Fiduciary duties control the "exercise of discretionary authority or control over plan management or administration," which by statutory definition includes the "management or disposition of [plan] assets." 517 U.S. at 890, *citing* 29 U.S.C. § 1002(21)(A). The Court's conclusion in that case that no fiduciary or prohibited transaction violation occurred when the employer used assets for "the payment of benefits pursuant to an amended plan," 517 U.S. at 895, does not establish a rule for this case, nor does it support the lower court's rule of immunity in connection with the transfer. To the contrary, the Court took pains to make clear that even a benefits design decision could constitute a prohibited transaction if it "disguise[d] an otherwise unlawful transfer of assets to a party in interest," 517 U.S. at 895 n.8.

The same principles emerge from *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999), where the Court again noted that "the employer's fiduciary duties [ ] consist of such actions as the administration of the plan's assets," but concluded that they were not implicated by design decisions about the recipients and amounts of plan benefits. 525 U.S. at 444. Similarly, there was no prohibited transaction because the plan assets were used "for the sole purpose of paying pension benefits to plan participants" and only provided an incidental employer benefit like any form of employee compensation. 525 U.S. at 442.

Thus, neither *Spink* nor *Hughes* involved any allegation of illegal employer conversion of plan assets or use of plan assets for a purpose other than actually paying benefits to participants. Neither case supports the lower court's conclusion that the pension asset transfer involving hundreds

of millions of dollars was immune from ERISA regulation because it was a "corporate business decision."[3]

The lower court's ruling also sets up a conflict in the lower courts on the scope of ERISA's prohibited transaction and fiduciary duty rules in the context of transfers from pension plans. A claim virtually identical to the employees' claim here was sustained in *Coleman v. Pension Benefit Guaranty Corp.*, 94 F.Supp. 2d 18, 24-25 (D.D.C. 2000), where employees alleged that the employer had received impermissible consideration in exchange for its transfer of plan assets to the PBGC – "$ 13 million in tax credits or waivers, and the removal of liens on its assets, as part of a quid pro quo for the asset transfer." The court rejected the argument by the PBGC, standing in the shoes of the employer as successor trustee, that other ERISA provisions governing transfers to the PBGC authorized the transaction. "It has not explained how its role as statutory trustee of the [plan] authorized it to engage in the form of quid pro quo alleged by plaintiffs."

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3. The other decisions cited by the court of appeals, *see* 17a, also do not justify this ouster of ERISA regulation. In those cases, there were no allegations of wrongdoing of the kind alleged here. The cases merely confirm that, *ignoring any other issues*, the threshold decision to make a pension transfer ordinarily is an employer decision. *See Hunter v. Caliber System, Inc.*, 20 F.3d 702, 718-20 (6th Cir. 2000) (decision whether to transfer assets not governed by fiduciary requirements, but "an employer's acts in furtherance of that decision may be subject to fiduciary duties"); *Ames v. American National Can Co.*, 170 F.3d 751, 757 (7th Cir. 1999) (negotiations regarding sale of a division not governed by fiduciary duties); *Systems Council EM-3 v. A T & T Corp.*, 159 F.3d 1376. 1379-80 (D.C. Cir. 1998) (decisions about how to allocate assets between AT& T and Lucent plans not governed by fiduciary duties; no sale or receipt of proceeds for assets involved); *Blaw Knox Retirement Income Plan v. White Consol. Industries, Inc.*, 998 F.2d 1185, 1190-91 (3d Cir. 1993) (no violation where underfunded pension plans' sponsorship transferred and "plans' assets remained unaffected;" no allegation that transfer involved "the investment or management of plan assets").

In the Fifth Circuit, likewise, *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991), emphasized as a basis for ERISA liability a fact that Respondents openly admitted in this case – the buyer paid the seller to transfer surplus plan assets. *See* 764 F. Supp. at 1208-1209. Chevron's defense was precisely the same as GE's defense here: "Chevron attempts to justify this payback procedure as exclusively a business arrangement that did not implicate [its] fiduciary duties." *Id.* at 1210. The court disagreed. It concluded that by selling the surplus when it could not otherwise capture it, Chevron "breached its duty of loyalty by treating the Gulf Pension Plan Trust as if it were Chevron's property. In doing so, Chevron violated [the prohibited transaction rules of] section 406(b)(1) and (3) of ERISA." *Id.*

The plain terms of ERISA prohibited GE from dealing in its own interest with actuarially defined "surplus" plan assets. This conclusion also is proven by pushing the logic of the lower court's ruling to its necessary but intolerable conclusion, which would apply to all plans with assets in excess of actuarially projected liabilities. If employers are not constrained by any ERISA provision other than the minimum funding rule of ERISA § 208, then GE (or any other plan sponsor) could transfer and sell all of a plan's surplus assets (for the GE plan, more than $9 billion in 1993) to any buyer and then pocket the proceeds for itself. The no-reversion rule of a plan and the prohibited transaction rules would be easily evaded in this manner, because an employer would always be able to convert/revert pension assets through the stratagem of a pension spin-off.

Under the lower court's ruling, however, none of this conduct relating to the pension asset transfer and conversion is subject to ERISA regulation, and because of ERISA's broad preemptive power, it could not be regulated at all.

The Court has emphasized that ERISA imposes "strict standards" on benefits plan administrators and other fiduciaries, *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-72 & n.10 (1985), "[t]o help fulfill ERISA's broadly protective purposes." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 & n.5 (1993). However, the lower court's decision creates or deepens conflicts among the circuits on several questions that are critical to effective enforcement of ERISA. Under the ruling of the lower court, employers can withhold material benefits information from employees who are deciding whether to accept transfer to a new employer; important early retirement pension benefits can be nullified through the simple device of inserting purported expiration dates in descriptions of these benefits; and employers are now free to sell-off and convert to their own benefit hundreds of millions of dollars of assets from pension plans.

The Court should intervene to resolve these questions and restore the protective framework that Congress established when it enacted ERISA.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that the Petition be granted and that a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED MARCH 2, 2001**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 00-7569(L), 00-7570(CON)

WILLIAM G. FLANIGAN, Individually and on behalf of all others similarly situated; ROGER L. PAPE, Individually and on behalf of all others similarly situated; DAVID J. OSTERHOUT, Individually and on behalf of all others similarly situated; MARVIN F. SEDLACEK, Individually and on behalf of all others similarly situated; ALAN R. SAYDAH, Individually and on behalf of all others similarly situated; JOSEPH E. LEONE, Individually and on behalf of all others similarly situated; STEPHEN LOUGHLIN, Individually and on behalf of all others similarly situated; DONALD R. BLOYER, Individually and on behalf of all others similarly situated; JOSEPH G. MCGUIRE, Individually and on behalf of all others similarly situated; MELVIN L. GILBERT, Individually and on behalf of all others similarly situated; BARBARA A. TOBLER, Individually and on behalf of all others similarly situated; JOSEPH M. BELMONT, Individually and on behalf of all others similarly situated; RICHARD R. DUCKO, Individually and on behalf of all others similarly situated; ANNA M. MARCO, Individually and on behalf of all others similarly situated; VERNON W. WAGNER, Individually and on behalf of all others similarly situated; CAROL A. MOODY, Individually and on behalf of all others similarly situated; MARK H. TRZYZEWSKI, Individually and on behalf of all others similarly situated; STEPHEN J. SMITH, Individually and on

behalf of all others similarly situated; DAVID P. CRANSTON, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

GENERAL ELECTRIC CO.; DALE F. FREY; MICHAEL J. COSGROVE; JOHN H. MYERS; JOEL R. WILSON; ARTHUR S. BAHR; ALAN M. LEWIS; EUGENE K. BOLTON; DONALD W. TOREY; MARTIN MARIETTA CORPORATION; JOHN H. KNIES; LOCKHEED MARTIN CORP.,

Defendants-Appellees,

LAUREEN WARRICK; KENNETH BRILLINGER; FREDERICK A. HOLMES; CHRISTINE GRUDZIEN; FRED M. SLOAN,

Movants.

December 4, 2000, Argued
March 2, 2001, Decided

* * *

OPINION

Before: KEARSE, WINTER, AND McLAUGHLIN, Circuit Judges.

*Appendix A*

McLAUGHLIN, Circuit Judge:

## BACKGROUND

The demise of the Soviet Union in the early 1990's had a direct impact upon the defense industry in the United States. As the industry reshaped itself, the Martin Marietta Corporation (now Lockheed Martin or "Lockheed") acquired the General Electric Company's ("GE's") aerospace division in a bewilderingly complex transaction that closed in early April 1993 (the "deal"). In the deal, Lockheed agreed to hire all 37,000 GE aerospace employees, and to give them employee benefits that were "substantially similar to their GE benefits." To implement that promise, a portion of GE's pension assets was to be transferred (the "pension asset transfer") to Lockheed to fund the pension obligations Lockheed was to assume for those employees.

Shortly before closing, plaintiffs (who were then employees of GE and unhappy with the deal) instituted this action, seeking a preliminary injunction to prevent the pension asset transfer. The transfer, however, proceeded when the United States District Court for the District of Connecticut (Arterton, J.) refused to block it.

While moving for the injunction, the plaintiffs also requested relief that would preserve their "right" to remain participants in the GE pension plan (the "GE plan"), and alleged: (1) that GE and Lockheed had violated a fiduciary duty to give them full information about their pension benefit rights; (2) that GE's investment of pension funds in 90-day United States T-Bills was imprudent; and (3) violations of the Employee Retirement Income Security Act ("ERISA").

*Appendix A*

In September 1996 ("Flanigan I"), the district court dismissed the plaintiffs' claims that: (1) they had a "right" to remain in the GE plan; and (2) GE had violated ERISA. In ruling on both GE's and Lockheed's — Lockheed had been named as a "knowing participant" in the alleged violations — motions to dismiss, the court found that the plaintiffs had no unconditional right to remain participants in the GE plan after they were no longer GE employees. The court also held that neither the pension asset transfer itself nor the amount of the transfer violated ERISA. The district court, however, refused to dismiss plaintiffs' attack on GE's T-Bill investment (the "investment claim"), or their claim that defendants had failed to provide sufficient information concerning their pension rights (the "communications claim"). The district court then requested an amended complaint.

Plaintiffs complied with the court's request, and a month later, filed an amended complaint reasserting the investment claim and formally adding Lockheed as a defendant in the action. Plaintiffs also reasserted the communications claim, and added two new claims against Lockheed: (1) that at some unspecified time after closing, the new Lockheed pension plan (the "Lockheed plan") experienced a partial termination, thereby entitling plaintiffs to a vesting of accrued benefits and an allocation of surplus assets (the "partial termination claim"); and (2) that Lockheed had impermissibly reduced accrued benefits by permitting two special benefit features carried over from the GE plan — the Special Early Retirement Option ("SERO") and the Plant Closing Pension Option ("PCPO") — to expire.

*Appendix A*

After another round of motions in September 1997 ("Flanigan II"), the court rejected plaintiffs' claim that benefits had been impermissibly reduced when Lockheed eliminated the SERO and PCPO options. However, the court let stand the investment claim, the communications claim and the partial termination claim. A year later, the court conditionally certified two sub-classes of plaintiffs to pursue these remaining claims.

Sub-class One included all former GE employees who had retired or resigned from GE between the announcement of the deal and its closing. They challenged the nature and timing of the information provided by GE and Lockheed regarding the benefits that Lockheed was to offer transferring employees after the closing (the communications claim). Sub-class Two comprised former GE employees who had actually transferred and had gone to work at Lockheed. They challenged the procedure by which GE and Lockheed arranged the transfer of an initial $1 billion in pension assets from one plan to another (the investment claim). Sub-class Two also made a claim against just Lockheed, alleging that the sequence of consolidation and downsizing moves after the sale constituted a partial plan termination under ERISA (the partial termination claim).

Following extensive discovery, defendants moved for summary judgment. It was granted by the district court. See *Flanigan v. Gen. Elec. Co.*, 93 F. Supp. 2d 236 (D. Conn. 2000) ("Flanigan III"). In its decision, the court first addressed the investment claim, and concluded that no fiduciary breach had occurred as a result of the GE plan's $1 billion T-Bill investment. Specifically, it held that in the transaction both Lockheed and GE were acting as settlors,

and not fiduciaries, and that even if GE could be considered a fiduciary, it had fulfilled its duties as such.

The district court next addressed the communications claim, and concluded that: (1) Lockheed had no fiduciary duties of communication to Sub-class One plaintiffs because ERISA does not cover prospective employees; (2) GE breached no disclosure duties because it did not know the final details of the new Lockheed plan; and (3) in any event, the plaintiffs had enough information to make informed decisions about their employment. Finally, the district court addressed the partial termination claim and found that plaintiffs had failed to exhaust their internal remedies.

Plaintiffs now appeal on a host of issues, claiming that the district court erred in both of its earlier dismissals (Flanigan I & II), as well as in granting summary judgment to defendants (Flanigan III). More particularly, plaintiffs claim that: (1) they had the right to stay in the GE plan rather than join the Lockheed plan; (2) the defendants violated ERISA's fiduciary duty rules, ERISA's rules prohibiting certain transactions, and its rules barring unlawful inurement when GE "converted" pension assets during the pension asset transfer; (3) they suffered from an illegal cutback of their SERO and PCPO benefits; (4) there are triable issues as to whether defendants failed to comply with their fiduciary duties to provide complete and accurate benefits information on a timely basis; (5) there are triable issues as to whether defendants violated their fiduciary duties by engaging in the T-Bill investment; and (6) there are triable issues as to whether a partial termination of the Lockheed plan occurred.

For the reasons set forth below, we affirm.

*Appendix A*

## DISCUSSION

This Court reviews a district court's grant of summary judgment de novo. See *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 547 (2d Cir. 1998).

Under Federal Rule of Civil Procedure 56(c), a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also *Silver v. City Univ.*, 947 F.2d 1021, 1022 (2d Cir. 1991). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." *Rodriguez v. City of New York*, 72 F.3d 1051, 1060-61 (2d Cir. 1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

I. There was no abdication of fiduciary duties

Plaintiffs contend that both GE and Lockheed were their fiduciaries under ERISA, and that both companies failed to live up to their fiduciary duties. Specifically, plaintiffs argue that GE and Lockheed: (1) failed to comply with their fiduciary duty to provide complete and accurate benefits information; (2) failed to comply with their fiduciary duty

to invest plan assets productively and prudently when they engaged in the T-Bill investment; and (3) breached their fiduciary duty by engaging in a prohibited transaction that violated ERISA's unlawful inurement rules by wrongly "converting" pension assets during the pension asset transfer. We address each claim in turn.

A. The communications claim

1. GE

Plaintiffs maintain that the district court erred by rejecting their claim that GE breached its fiduciary duty by not disclosing quickly enough the exact employee benefits that plaintiffs would receive when they moved over to Lockheed. Specifically, they assert that GE's fuzzy representations that the Lockheed benefits would be "substantially similar" or "essentially equal" to the benefits they previously enjoyed at GE frightened them into retiring before the closing of the deal.

Communicating information about future plan benefits is indeed a fiduciary obligation. See *Varity Corp. v. Howe*, 516 U.S. 489, 498-99, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996). Fiduciaries may be held liable for statements pertaining to future benefits if the fiduciary knows those statements are false or lack a reasonable basis in fact. See *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 126 (2d Cir. 1997). This Court has also held fiduciaries liable for non-disclosure of information about a current plan when the omitted information was necessary to an employee's intelligent decision about retirement. See *Becker v. Eastman Kodak Co.*, 120 F.3d 5 (2d Cir. 1997).

*Appendix A*

In this case, GE undertook a serious communications effort to disclose the post-closing benefits that Lockheed would provide once Lockheed decided what those benefits would be. In November 1992, GE and Lockheed distributed a letter to all of the employees, assuring them that they would receive "comprehensive information on their benefits, including the successor employer provisions of GE's plans and the terms for transition to Lockheed's generally comparable benefits package." In December 1992, GE and Lockheed began distributing to employees "Teaming Updates," which included information about the post-closing benefits. The first update stated,

> We want to respond quickly to employee concerns, but more importantly, we want our responses to be correct. The fact is that it will take longer to answer some questions than others. For instance, some of the benefit questions raised are very complex. They need to be thoroughly researched and considered by both GE and Lockheed people working these issues. Many involve legal and tax ramifications which must be carefully deliberated. This will require diligent effort on our part, and patience on your part.

Similar communications continued through March. The March 10, 1993 "Teaming Update" informed employees that information about the Lockheed plan would be distributed by the week of March 22. On March 22, GE and Lockheed notified all employees that they had at least until April 2, 1993 to decide whether to retire or transfer to the Lockheed Plan. On March 23, 1993, employees received a Teaming

Update detailing what the benefits would be, post-closing, were they to transfer to Lockheed.

These communications easily fulfilled any pertinent obligation on GE's part. While it is true that ERISA fiduciaries "may have duties to disclose information about plan prospects that they have no duty, or even power to change," *Pegram v. Herdrich*, 530 U.S. 211, 120 S. Ct. 2143, 2154 n.8, 147 L. Ed. 2d 164 (2000) (citing *Varity Corp.*, 516 U.S. at 505), "we do not require an ERISA fiduciary to be perfectly prescient as to all future changes in employee benefits. Nor do we require a fiduciary to disclose its internal deliberations . . . ." *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994) (internal quotations and citations omitted). Thus, we have held that fiduciaries are "not required to voluntarily disclose changes in a benefit plan before they are adopted" because "insisting on voluntary disclosure during the formulation of a plan and prior to its adoption would, we think, increase the likelihood of confusion on the part of beneficiaries and, at the same time, unduly burden management, which would be faced with continuing uncertainty as to what to disclose and when to disclose it." *Pocchia v. Nynex Corp.*, 81 F.3d 275, 278 (2d Cir. 1996). There is, therefore, no evidence that GE withheld material information concerning Lockheed benefits, or that GE purposefully misled the plaintiffs in any way (the two requirements for a fiduciary breach in this situation). See *Becker*, 120 F.3d at 8; *Ballone*, 109 F.3d at 122.

In any event, as of February 19, 1993, all GE employees knew that their pensions — the central element of their benefits would be calculated at Lockheed by the identical

formula previously used at GE. One month later, GE and Lockheed also announced that the majority of the remaining benefit programs would also remain identical. All this information was provided prior to the time that any final employment or retirement decisions had to be made by GE employees (April 2, 1993). We regard this as timely.

2. Lockheed

a. Lockheed owed no fiduciary duty

To the extent that this claim is brought against Lockheed, it is invalid, because Lockheed was not a fiduciary when these communications occurred.

ERISA's fiduciary duties run to "participants" in employee benefit plans. See ERISA § 404(a)(1), 29 U.S.C. § 1104 (a)(1). ERISA defines "participant" as: "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." ERISA § 3(7), 29 U.S.C. § 1002(7). Participants are only those " 'employees in, or reasonably expected to be in, currently covered employment . . .' or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989) (internal citations omitted).

Although the class of plaintiffs who challenged the timeliness of Lockheed's communications never became

Lockheed's employees, at the time of the pre-closing communications, they were potential employees. Thus, had there been a plan in effect, Lockheed might have had a duty to disclose the details of it to that class of employees. However, before the closing, there was not yet any "currently covered employment" of which to speak. Because we do not require fiduciaries to disclose plan details before they are adopted, Lockheed had no duty to disclose what were at best internal deliberations.

b. Lockheed was not a "knowing participant" in GE's breach

Lockheed cannot be found to be a "knowing participant" in GE's alleged breach of fiduciary duties, because, as explained above, GE committed no such breach.

B. The T-Bill claim

1. GE

The sub-class of plaintiffs who transferred to Lockheed contend that GE breached its fiduciary duty by investing $1 billion in pension assets earmarked for transfer to the Lockheed plan in low interest 90-day U.S. Treasury Bills. They complain that in doing so, GE disregarded the plaintiffs' interests in order to advance GE's goal of closing the deal with Lockheed quickly. However, this sub-class of plaintiffs has no standing to pursue this claim. Since GE was required to transfer a fixed amount — $1 billion plus T-bill interest — to Lockheed immediately after the closing, any harm from investing that amount in T-bills inured to GE, not Lockheed.

Had GE instead invested the $1 billion in equities, it still would have had to transfer to Lockheed only the value of $1 billion plus the interest earned over the period, had it been invested in T-bills. GE would have been able to keep any additional earnings and, likewise, would have bore the loss had the equity investment produced less than would have a T-bill investment. Thus, GE's investment decision had no effect on what Lockheed ultimately received.

a. GE acted prudently

Moreover, even if this sub-class had standing, GE acted prudently. In supervising pension assets, plan trustees have fiduciary obligations that have been described as "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982). The obligations include the following:

> ERISA Sections 404(a)(1)(A) and (B) impose three different although overlapping standards. A fiduciary must discharge his duties "solely in the interests of the plan participants and beneficiaries." He must do this "for the exclusive purpose" of providing benefits to them. And he must comply "with the care, skill, prudence, and diligence under the circumstances then prevailing" of the traditional "prudent man."

Id. at 271 (quoting ERISA §§ 404(a)(1)(A) & (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B)). In making investment decisions, plan trustees must conduct a "careful and impartial investigation," with "an eye . . . to the interests of the participants and beneficiaries." Id.

*Appendix A*

As noted above, in making investment decisions, GE had to conduct a "careful and impartial investigation," with "an eye . . . to the interests of the plan participants and beneficiaries." *Bierwirth*, 680 F.2d at 271. When deciding if a plan trustee has met its fiduciary obligations, this Court must "inquire 'whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.' " *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983)). Typically, a "prudent person" test is used. *Katsaros*, 744 F.2d at 279.

In this case, the undisputed facts demonstrate that GE employed appropriate methods to investigate and determine the wisdom of the 90-day T-Bill investment. Specifically, the GE plan trustees testified that, given the short-term liquidity needed to transfer $1 billion plus interest in approximately 90 days, it was prudent to invest the $1 billion in solid short-term assets. This course eliminated the risk that the GE plan trustees would, in the event of a market downturn, have to liquidate substantial additional plan assets to satisfy the contractual, $1 billion cash requirement to Lockheed.[1] In reaching this decision, it cannot be said that GE or its plan trustees acted irrationally or imprudently. See 29 U.S.C. § 1104(a)(1)(B); *Katsaros*, 744 F.2d at 279.

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1. The transaction agreement, dated November 22, 1992, among GE and Lockheed (the "Transaction Agreement"), paragraph V.06(c), requires a transfer at closing of $1 billion plus an amount equal to the "earnings or losses attributable to the investment of such assets in the manner provided in paragraph (a)." Paragraph (a), in turn, states that the $1 billion will be invested in T-Bills "or as mutually agreed" upon by GE and Lockheed.

2. Lockheed

a. Lockheed was not a fiduciary

Under ERISA, a person or corporation is a plan fiduciary "to the extent he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . , or he has any discretionary authority or responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). "Under this definition, a person . . . has fiduciary status only 'to the extent' that he has or exercises the described authority or responsibility." *F.H. Krear & Co. v. Nineteen Named Trs.*, 810 F.2d 1250, 1259 (2d Cir. 1987).

Lockheed clearly was not a fiduciary of the GE plan because it had no authority or responsibility over it. Lockheed had no control over: (1) GE's decision to enter into the deal; or (2) the GE plan's trustees' decision to go forward with the T-Bill investment. Plaintiffs assert that Lockheed acquired fiduciary status as to the T-Bill investment when it negotiated and entered into the deal. However, an unrelated third-party like Lockheed does not acquire fiduciary obligations simply by negotiating the terms of a deal. See id.

Nor did the Transaction Agreement impose fiduciary responsibility upon Lockheed under these circumstances. The record shows that GE wanted to give Lockheed more control over the investment decision, but that Lockheed refused and demanded the $1 billion plus T-bill interest at closing,

risk-free. The Transaction Agreement expressly stated that, if GE invested the money at the T-bill rate, Lockheed would not assume any fiduciary responsibility with respect to the assets pre-closing. Moreover, the Transaction Agreement provided for an alternative investment approach whereby GE and Lockheed could agree to invest the assets in a different manner. Were this alternative chosen, the Transaction Agreement then required Lockheed to assume co-fiduciary status with respect to the assets. The parties selected to pursue the T-bill strategy, thereby absolving Lockheed of responsibility under the terms of the Transaction Agreement.

b. Lockheed was not a "knowing participant" in GE's breach

Lockheed cannot be found to be a "knowing participant" in GE's alleged breach of fiduciary duties, because again, as explained above, GE committed no such breach.

C. The unlawful inurement claim

1. GE

The plaintiffs assert that the district court erred when it rejected their claims challenging a supposedly ancillary benefit derived by GE from the transfer of pension assets to the Lockheed plan. The GE plan was a defined benefit plan that contained a significant actuarial surplus at the time of the transfer: the plan's assets were greater than its liabilities. During the transfer, some of this surplus went over to the Lockheed plan. The plaintiffs therefore contend that, because of this surplus, GE received: (1) a higher sale price for the

aerospace business; or (2) an advantage in dealing with government contract claims, and that these possible benefits violated GE's fiduciary duties. See 29 U.S.C. § 1103(c)(1).

Fiduciary duty and prohibited transaction rules apply only to decisions by an employer acting in its fiduciary capacity. See 29 U.S.C. §§ 1104(a), 1106(a)(b). Although it is an issue of first impression in this Circuit whether an allocation of pension plan assets and liabilities resulting from the spin-off of a division triggers fiduciary duties under ERISA, recent Supreme Court case law and that of at least four circuit courts of appeals indicate that it is not. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44, 142 L. Ed. 2d 881, 119 S. Ct. 755 (1999) (holding that "an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties"); *Lockheed Corp. v. Spink*, 517 U.S. 882, 135 L. Ed. 2d 153, 116 S. Ct. 1783 (1996) (holding that an employer does not act as a fiduciary when it establishes, modifies or terminates an ERISA-covered pension plan); *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 719 (6th Cir. 2000) (holding that the transfer of assets from one plan to another was not a decision subject to ERISA's fiduciary obligations); *Ames v. Am. Nat'l Can Co.*, 170 F.3d 751, 757 (7th Cir. 1999) (holding employer's decision regarding how to structure plan was not a fiduciary decision); *Sys. Council EM-3 v. AT&T Corp.*, 333 U.S. App. D.C. 63, 159 F.3d 1376, 1379-80 (D.C. Cir. 1998) (holding employer's allocation of a restructured plan's excess was not a fiduciary decision); *Blaw Knox Retirement Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1189 (3d Cir. 1993) (holding decision to sell off a division and transfer

plan assets was not a fiduciary decision). Because GE's decision to spin-off the division along with its pension plan was, at its core, a corporate business decision, and not one of a plan administrator, GE was acting as a settlor, not a fiduciary, when it transferred the surplus to Lockheed. Therefore, GE's general fiduciary duties under ERISA were not triggered.

Nor did the transaction result in an unlawful inurement to GE. See 29 U.S.C. § 1103(c)(1) (providing that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan"). Although GE might have received some benefit, such as a higher sale price, because it was able to transfer some of the surplus to Martin, Section 1103 "focuses exclusively on whether fund assets were used to pay pension benefits to plan participants." *Hughes Aircraft*, 525 U.S. at 442. In this case, all of the pension surplus that GE transferred to Lockheed was used to fund pension benefits. Any benefit received by GE was, at most, indirect. Cf. *Morse v. Stanley*, 732 F.2d 1139, 1146 (2d Cir. 1984) ("It is no violation of a trustee's fiduciary duties to take a course of action which reasonably best promotes the interest of plan participants simply because it incidentally also benefits the corporation."; *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1995) (holding, in Section 1104 context, employer did not inappropriately benefit when it used surplus from one benefit plan to fund another, thereby making second plan more efficient and, therefore, not exclusively inuring to benefit of first plan members); *Donovan v. Walton*, 609 F. Supp. 1221, 1245 (S.D. Fla. 1985) (holding ERISA "simply does not prohibit

a party other than a plan's participants and beneficiaries from benefitting in some measure from a prudent transaction with the plan"), aff'd sub nom. *Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986).

It is also important to note that GE fully funded all accrued benefits in its transfer to the Lockheed plan. Although the fact that this was a settlor transaction means that ERISA's general fiduciary provisions were not triggered, ERISA provides mandatory special rules for the transfer of plan assets. ERISA Section 208 provides:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately prior to the merger, consolidation, or transfer (if the plan had then terminated).

29 U.S.C. § 1058. Therefore, because this was a defined benefit plan (a plan in which certain, discrete benefits are guaranteed), plaintiffs ended up receiving everything to which they were entitled. See 29 U.S.C. § 1058; *Brillinger v. Gen. Elec. Co.*, 130 F.3d 61, 63-64 (2d Cir. 1997) (holding that, under ERISA Section 208, participants were not entitled to have benefits increased after merger, despite existence of pension-asset surplus, because fact plan was a defined-benefit plan meant Section 208 was satisfied as long as benefits not reduced).

2. Lockheed was not a "knowing participant" in GE's breach

Lockheed cannot be found to be a "knowing participant" in GE's alleged breach of fiduciary duties, because once again, as explained above, GE committed no breach.

## CONCLUSION

We agree with the manner in which all other issues raised by appellants have been addressed in the thorough opinions of the district court.

We have also considered all the appellants' remaining contentions and find them to be without merit.

Accordingly, we AFFIRM the grant of appellees' motions for dismissal.

## APPENDIX B — RULING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND DECIDED MARCH 29, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

NO. 3:93cv516 (JBA)

WILLIAM G. FLANIGAN, ET AL.

v.

GENERAL ELECTRIC CO., ET AL.

March 29, 2000, Decided

* * *

RULING

Janet Bond Arterton, U.S.D.J.

* * *

In this litigation under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., plaintiffs challenge certain aspects of Lockheed Martin's ("Martin") purchase of General Electric's Aerospace Division ("GE"). This large corporate transaction allegedly resulted in the displacement of thousands of employees, reductions in benefits for thousands more, and the premature retirement and/or resignation of a number of employees who did not

transfer employment to Martin due to their uncertainties about the benefits to be provided. Martin and GE, for their part, argue that they have done everything ERISA requires and more in facilitating the purchase agreement. After two motions to dismiss resulted in a winnowing of the claims presented, this Court conditionally certified two sub-classes of plaintiffs. Both GE and Martin now seek summary judgment as to all plaintiffs' claims.

## I. PROCEDURAL AND FACTUAL BACKGROUND

As part of the defense industry cut-backs prevalent in the early 90's, Martin acquired GE's aerospace division in a complex transaction that closed in early April 1993. Pursuant to the transaction agreement, Martin agreed to hire all GE Aerospace employees, and a certain portion of GE's pension assets was transferred to Martin to fund the pension obligations Martin assumed for those employees. Shortly before the closing, plaintiffs (then employees of GE) instituted this action, seeking a preliminary injunction to prevent the pension transfer. In April of 1993, however, the transfer proceeded without intervention by the court.

In ruling on GE and Martin's motions to dismiss, the Court eliminated plaintiffs' claims that they had an unconditional right to remain participants in the GE Plan notwithstanding the discontinuation of their employment, and that both the pension transfer itself and the amount of the transfer violated ERISA, in that plaintiffs were entitled to a pro rata share of the GE Plan's excess funding upon transfer. Upon Martin's second motion to dismiss, the Court also dismissed plaintiffs' claims that a partial plan termination

occurred when Martin eliminated certain layoff benefits that had been part of GE's Plan, and that the discontinuation of these benefits violated ERISA. See Docs. # 144, # 160.

The Court then conditionally certified two sub-classes of plaintiffs to pursue the remaining claims. Sub-class One, defined as all former GE employees who retired or resigned from GE between the announcement of the sale and the closing, challenge the nature and timing of the information provided by GE and Martin regarding the benefits that Martin would offer the transferring employees post-closing (Count I). Sub-class Two, consisting of former GE employees who transferred their employment to Martin, challenges the procedure by which GE and Martin arranged the transfer of an initial $1 billion in pension plan assets from one plan to another (Count III). Sub-class Two also brings a claim against Martin alone, alleging that the sequence of consolidation and downsizing moves subsequent to the GE sale constituted a partial plan termination under ERISA (Count II).

A. Facts Relating to Prudence Challenge to T-Bill Investment (Count III)

The sale of GE's aerospace division to Martin was governed by a complex document known as the "Transaction Agreement" which required Martin to offer employment to all GE Aerospace employees and to create a successor pension plan for the transferring employees. Pl. Dep. Ex. 187 at LMC2510-13.[1] The GE pension plan ("GE Plan") was

1. The volume of exhibits referred to by plaintiff as "Deposition Exhibits" will be cited to as "Pl. D. Ex. __," while the third volume (Cont'd)

a defined benefit plan, and the transaction agreement provided that GE employees who accepted Martin's offer of employment would cease to participate in or accrue further benefits under that plan; instead, they would become participants in a new plan established by Martin, and upon retirement would receive pension benefits paid solely by the Martin plan, but based on cumulative years of service with both GE and Martin. Pl. D. Ex. 187 at LMC2513-14. The transaction agreement required that as of the closing date, the GE Plan would transfer both the accrued pension benefit liabilities of all accepting employees and a defined amount of GE Plan assets to the new Martin plan. Sufficient assets to satisfy the requirements of ERISA and applicable IRS regulations were to be transferred, along with a portion of the GE Plan's surplus assets, as the GE Plan was over-funded at the time of the merger.

The amount of pension assets to be transferred was determined according to a complex formula set out in the transaction agreement. As GE and Martin would not know the number of employees who accepted Martin's offer until after the closing date, the parties could not calculate the exact amount of pension liabilities and assets that needed to be transferred until that point. Therefore, the transaction agreement provided that the asset transfer was to take place in two stages. An initial amount of $1 billion would be

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(Cont'd)
of plaintiff's exhibits, entitled "Plaintiff's Other Exhibits," will be cited as "Pl. Ex. __." The defendants exhibits will be cited to as "GE Ex. __" and "Martin Ex. __." The Court will cite to deposition testimony submitted by all parties with the name of the deponent and transcript page number.

transferred immediately upon the closing, plus an amount adjusted in an agreed-upon manner to reflect the passage of time and interest earned on that amount since December 31, 1992, the date used to calculate assets and liabilities for ERISA reporting requirements. Bunt Dep. at 51-51, GE Ex. 5. Had a later date been chosen for the valuation, GE would have incurred significant expense and time recalculating the asset amount, yet had the parties based their calculations on "rough estimates" premised on November 1992 figures, it would have "caused tough sledding with the Govt." GE Ex. 85. Following the closing, the precise amount to be transferred would be calculated, based on the number of employees accepting Martin's offer, from which would be subtracted the initial transfer amount of $1 billion, and the "residual transfer amount" would then be transferred to the Martin plan. Pl. D. Ex. 187 at LMC 2513-14.

Given that the plan at issue was a defined benefit plan, the sponsoring employer bore the risk of gain or loss from the plan's investments. See *Hughes Aircraft v. Jacobson*, 525 U.S. 432, 119 S. Ct. 755, 761, 142 L. Ed. 2d 881 (1999) (In context of defined benefit plans, "the employer typically bears the entire investment risk and . . . must cover any underfunding as the result of a shortfall that may occur from the plan's investments."). The parties to the transaction anticipated that the closing would occur at the end of the first quarter 1993, but the transfer amount had to be determined earlier, as noted above. Therefore, GE and Martin had to determine who would bear both investment responsibility and risk for the $1 billion transfer amount between December 31, 1992, the date at which the amount could be calculated, and the closing, occurring on an as-yet-

uncertain date in the future. According to the drafts of the Transaction Agreement contained in the record, and the deposition testimony of various executives involved in the negotiations, GE initially proposed that Martin control the investment of the transfer amount for the specified period, and that any investment gains or losses would be reflected in the ultimate transfer amount. Pl. D. Ex. 25; Barreca Dep. at 52, GE Ex. 1. Martin rejected this proposal, indicating that it wanted the full amount of $1 billion available at closing, and not subject to investment risk, in order to establish the new Martin plan. Dammerman Dep. at 16, 46. According to negotiators on both sides of the table, Martin did not want fiduciary status or obligations prior to the closing. Barreca Dep. at 52; Block Dep. at 211-12, 227.

In light of these concerns, the parties finally agreed that the initial transfer amount of $1 billion would be segregated from the remainder of GE's pension assets as of December 31, 1992 and invested in 90-day treasury bills ("T-bills"). While the record does not indicate who suggested the final compromise, Dammerman, GE's Chief Financial Officer, and one of the negotiators to the agreement, testified that "I can't recall specifically whether I said it, someone else said it, whether it was the GE side or the Martin Marietta side, but it's a pretty obvious thing that you got two choices, if that's the case, put it in cash or you put it in a treasury instrument that is not subject to swings in market value." Dammerman Dep. at 16. Plaintiffs do not point to any disputed facts regarding these negotiations, or the respective objectives of Martin and GE in those negotiations. The relevant provision of the final transaction agreement reads as follows:

*Appendix B*

> As of December 31, 1992, GE shall cause the trustee of each Pension Plan to segregate, in cash or cash-equivalents $1,000,000,000 representing a portion of the total assets (estimated by GE and understood by MMC to be approximately $1,650,000,000) allocable to Transferred Employees as of December 31, 1992 and to invest such assets (I) in ninety (90) day Treasury Bills or (ii) as mutually agreed in writing by GE and MMC, in each case to the extent consistent with GE's fiduciary obligations under ERISA. In the case of (ii) above, GE shall designate, and MMC shall acknowledge its status as, a 'named fiduciary' (within the meaning of Section 402(a)(2) of ERISA) with respect to the GE Pension Plan.

Pl. D. Ex. 187 at LMC2512 (emphasis added). The agreement further provided that the assets segregated pursuant to the above paragraph, "including earnings or losses attributable to the investment of such assets in the manner provided in [the paragraph quoted above]," would be delivered to the new Martin plan at closing. Id. After the closing, GE was to calculate the residual transfer amount, and deliver it to the Martin plan as well. Id. Neither Martin nor GE ever investigated the alternative investment approach allowed in (ii) of the above paragraph. Block Dep. at 212-213.

The trustees of GE's pension plans then reviewed the transaction agreement. All testified at their depositions that they believed they had an independent obligation to review the proposed investment to determine if it was consistent

with their fiduciary duties to the plan, or whether an alternative investment could provide the same required returns by the closing date. Myers Dep. at 32; Bolton Dep. at 28-29; Cosgrove Dep. at 53-54; Frey Dep. at 32-33. The trustees acknowledged, however, that while they considered ideas such as a 'hedging strategy' or a 'put call,' Frey Dep. at 33, they did not have many in-depth discussions, because as Trustee Frey put it, "if you had a 90-days investment to make, then a 90 day T-bill jumps right out at you." Id. Moreover, the parties to the agreement did not engage in an extended market analysis to determine whether the market was likely to go up or down over the first ninety days of 1992. Dammerman Dep. at 48-49 (recalls no discussions with Martin's CFO regarding future performance of markets); Block Dep. at 243. The GE trustees testified that short-term market behavior is difficult to predict, and that they made investment decisions based on a long-term strategy. Cosgrove Dep. at 90 ("We, as a general rule, are long-term investors and not market timers."); Bolton Dep. at 54 ("I don't believe we would have had a short-term view of the market for a period of weeks with any certainty we would know what was going to happen to the market."). The trustees received monthly information concerning market conditions and trends, and the November 1992 reports indicated volatility and the possibility of a market correction, due to sluggish growth, international economic factors and the unknown effect of the recent election of President Clinton and the new Congress on the stock market. Cosgrove Dep. at 104-05; GE Exs. 205-06. According to the trustees, given the liquidity need to have the funds available for transfer along with a set amount of interest, and given the fact that in the case of a short-term market downturn GE would have

been required to make up the difference at the closing, "the most prudent investment vehicle to deliver the funds that were specified in the contract was the 90-day treasury bill." Myers Dep. at 45.

Plaintiffs point out that GE did not convert any of its remaining assets to cash or invest in T-bills at that time, nor had it done so at any point in the plan's history. Cosgrove Dep. at 89; Pl. D. Ex. 101 and 102 (quarterly statements of pension trust). Plaintiffs also look to contemporaneous analyses performed by the trustees and the GE Investments Allocation Committee taking the position that current economic indicators generally favored investments in stocks. Pl. D. Ex. 206. The plaintiffs' experts state in their reports that the fundamental principles of prudent investment management require that fiduciaries remain focused on the long-term investment horizon by actively managing the investment portfolio, maintaining most assets in equities and stocks and keeping cash holdings to a minimum. Schwan Report at 3-7. Plaintiff's ERISA expert opines that the change in the sponsorship of the pension plan and the change in the identity of specific investment managers for those investments did not require greater liquidity than the GE plan had at the time, nor was there a justification under prudent investment management fundamentals to change from the "active investment strategy" employed by both GE's plan and the then-existing Martin plan. Gordon Report at 8.

While the trustees testified that they did consider alternative strategies, they agreed that they were locked into the contract between GE and Martin, in terms of the amount that the pension plan had to be able to transfer at the closing.

Cosgrove Dep. at 41-42 ("As trustees of the GE Pension Trust we had nothing to decide. We were trying to comply with the legal contract somebody else had written."); Dammerman Dep. at 38 (only discussions on topic of how to invest pension assets was single discussion of whether "there was another way to invest the billion dollars that would do the same thing, protect the principal"). The record is clear that the trustees did not believe they had the authority to override the agreement between Martin and GE that $1 billion in assets be segregated and transferred at closing along with interest at the 90-day T-bill rate; rather, the trustees simply looked to whether there were any alternate means of achieving the result that had been agreed to by the parties, without subjecting the $1 billion to excessive investment risk. See Cosgrove Dep. at 94 (only discussions among trustees relating to Martin transaction was whether "there was a way, other than the use of Treasuries, to execute a strategy to achieve what [the] contracting parties wanted to do"); Bolton Dep. at 28-29 (discussions with other trustees focused on "how the assets should be invested, the billion dollars that we had to provide at a specific date and time and then some discussion about what alternatives might be to protect or to invest the money so there wouldn't be any downside over this relatively short period of time").

The trustees were aware that if they chose a less secure investment strategy, and GE's portfolio lost value due to a market downturn, any short fall would be "to GE's account" —that is, GE would be required to make up the difference in order to transfer the agreed-upon amount. See Frey Dep. at 33. Several of the Trustees also indicated in their deposition testimony that the contract between GE and

Martin determined the outcome of their decision. Cosgrove Dep. at 42 (When asked who made the decision to put the transfer amount into treasury bills, responded "I think the contract told us to put it into Treasuries.")

GE's expert Ellen Hennessy states in her report that in her experience, "plan sponsors routinely negotiate the form in which assets are to be transferred from one plan to another," and "a transfer in cash is not uncommon." GE Ex. B, Tab 1. She concluded that the GE Plan fiduciaries acted prudently in investing the $1 billion in T-bills prior to the closing, as

> there would have been a significant risk of large losses during the period between December 31, 1992 and the closing date of the GE aerospace business sale if the $1 billion in assets earmarked for the [transitional Martin plan] had remained invested in the same manner as the GE Pension Plan assets were invested as a whole. Since 1926, a portfolio composed of a 50-50% mixture of large company stocks and long-term corporate bonds has had losses in 86 calendar quarters out of 288.

Id. at 3-4. She opined that the fiduciaries were not required to obtain any legal written opinion as to whether the conversion of plan assets and the T-bill investment were prudent under ERISA, as in her experience "such opinions are rarely, if ever, sought or given in such transactions," because such decisions are investment decisions, not legal issues. Her firm also conducted a survey of 150 large pension plan sponsors for their views as to appropriate actions relating

to transfers of pension trust assets. GE Ex. C. A majority of those responding to the survey indicated that if they were required to transfer a certain percentage of the assets in cash or cash equivalents, plus a specified interest rate, on a transfer date that was 90 days after the valuation date, they would liquidate the assets on the valuation date and incur minimal risk on the funds by choosing a conservative investment vehicle that would provide a fixed rate of return comparable to treasury bills. Id. This survey, however, did not disclose the gross amount that the percentage represented in this case, i.e. $1 billion.

Plaintiffs' investment expert conceded in his deposition that, in a hypothetical situation where an ERISA fiduciary needed to liquidate 5% of a pension plan's assets to provide lump sum distributions to retirees within a 90-day time frame, deciding to not subject those assets to market risk and placing them in a secure investment for the 90-day period was prudent. Schwan Dep. at 211.

None of the trustees had any prior experience with an asset transfer in an amount as large as the $1 billion transfer provided for in the transaction agreement, nor were the trustees aware of any pension asset transfers where the assets had been liquidated and held in T-bills prior to the transfer. Bolton Dep. at 44; Bennett Dep. at 19-20. In subsequent agreements with Loral and Lockheed, see infra, pension investments were not liquidated, but were transferred in kind. Martin's chief negotiator of the benefits and pension assets transfer portion of the transaction agreement, Assistant General Counsel Marion Block, did not consult with Martin officials such as the Director of Pension Investments, Hendon

Dep. at 15-16; Martin's Treasurer, McGregor Dep. at 14; Martin's Chief Financial Officer, Bennett Dep. at 32; or Martin's Controller, Buchanan Dep. at 39. GE trustees and pension officials testified that logistically, the pension investments could have been liquidated in a relatively short period of time. Myers Dep. at 57; Frey Dep. at 66 (does not recall how long it took to liquidate assets to raise $1 billion, "but I would imagine we're pretty good at doing it very fast.")

As demonstrated by the existence of this litigation, the actively invested portion of GE's pension assets performed better than the 90-day T-bill rate over the relevant period. According to Plaintiffs' investment expert, the difference between the GE Plan's portfolio return for the period the $1 billion was invested in 90-day treasury bills and the actual return earned on the T-bill investment is $34,615,000, and it is this amount that plaintiffs seek in recovery for the new Martin plan.

B. Facts relating to claim that GE and Martin failed to provide clear and complete information regarding future benefits (Count I)

1. Information Provided to Plaintiffs.

As noted above, the final version of the Transaction Agreement dated November 22, 1992 required Martin to offer employment to the more than 30,000 employees of the affected GE units, and to provide "substantially similar" employee benefit plans for those employees through the end of 1993. Pl. D. Ex. 187 at LMC2510-11. The record demonstrates that Martin was reluctant at first to accept the

"substantially similar" language, as it wanted to maintain the flexibility to implement benefits plans that were "commercially practicable," but it ultimately acceded to GE's position. Block Dep. at 160. The Transaction Agreement also provided that at the closing, GE and Martin would enter into a benefit administrative agreement whereby GE would "provide investment, management and administrative services with respect to benefit plans and arrangements adopted by the parent." Pl. D. Ex. 187 at LMC2512.

The Transaction Agreement between GE and Martin was signed on November 22, 1992, and announced publicly on November 23. In a November 23 joint letter to GE employees from the CEO's of both corporations, GE's Jack Welch and Martin's Norman Augustin assured employees that

> We will provide you with regular and complete reports on the status of the merger. You will receive comprehensive information on your benefits, including the successor employer provisions of GE's plans and the terms for transition to Martin Marietta's generally comparable benefits package. You will be promptly informed of organization and staffing decisions that affect your role in Martin Marietta.

Pl. D. Ex. 35. Employees reacted strongly to the news of the merger, and in particular raised many inquiries regarding the meaning of "generally comparable" benefits. Welch Dep. at 59-60. To address these inquiries, an "Additional Statement on Benefits Provisions in the GE Aerospace – Martin Marietta Merger Agreement" was released on

November 24, 1992. This statement informed GE Aerospace employees that:

> 1. Full GE benefits coverage will continue to the merger date.
>
> 2. Coverage under Martin Marietta's plans will begin on the merger date. The merger will occur in the first half of 1993. At that time, Martin Marietta will provide transition benefit plans that are substantially similar to the current GE plans. Coverage under these plans, which will be essentially the same as GE's plans, will continue at least to the end of 1993.
>
> 3. From the merger date forward, transferred employees of all GE operations involved in the merger transaction will be given full credit for GE service for eligibility, vesting, and benefit accruals under Martin Marietta benefit plans and programs.

Pl. D. Ex. 125. On December 2, 1992, a letter from GE CEO Welch was distributed to all GE employees. The letter explained the rationale for the merger, and outlined "key features" of the merger arrangement with Martin. In relevant part, the letter stated that

> Martin Marietta will provide pay and benefits that are essentially equal to GE's programs through the end of 1993. For the longer term, employees can expect wages and benefits under Martin

> Marietta that are competitive with industry practices, as are those provided by GE.

Pl. D. Ex. 124.

Beginning on December 10, 1992, a series of communications entitled "Teaming Update" were distributed to GE employees. GE published these updates, but Martin controlled the content pertaining to post-closing benefits. Welch Dep. at 37-38. The first Teaming Update contained the following statements:

> It is our intent to keep you as fully informed as possible as events connected to the merger unfold and as information becomes available. . . . The merger announcement has generated literally thousands of questions from employees on a range of issues, from benefits to employment practices in the new company, from transition plans to specifics about Martin Marietta's current product lines, to cite just a few examples. We want to respond quickly to these concerns, but more importantly, we want our responses to be correct.
>
> The fact is that it will take longer to answer some questions than others. For instance, some of the benefit questions raised are very complex. They need to be thoroughly researched and considered by both GE and Martin Marietta people working these issues. Many involve legal and tax ramifications which must be carefully deliberated. This will require diligent effort on our part, and patience on your part.

Pl. D. Ex. 126. This issue, like the ones that followed, included a question-and-answer portion that addressed specific inquiries regarding the transitional and 1994 benefits that Martin would offer:

> Martin Marietta will provide benefits that are essentially equal to GE's programs through the end of 1993. Decisions on what the benefits package will be in 1994 have yet to be made. A transition team of Aerospace and Martin Marietta people will be working together on benefits design in the coming year. Martin Marietta will fully inform employees of 1994 benefit plans well before the effective date.

Id. References to "essentially equal" benefits were also made in the Teaming Updates issued on December 18, 1992, Pl. D. Ex. 127, and December 23, 1992, Pl. D. Ex. 128. The January 8, 1993 Teaming Update included a question-and-answer exchange suggesting that some employees at GE felt the information being disclosed was insufficient:

> Q: It seems like the merger closing date is forcing us to make a decision to retire in a hurry and without all the facts. Why are GE and Martin Marietta rushing to complete the merger?
>
> A: . . . . The intent is not for anyone to make a hasty decision to retire. Our efforts have been directed at providing complete GE retirement benefits information for those eligible to retire so they can make an informed decision.

Pl. D. Ex. 129.

*Appendix B*

GE sent a special package to the homes of several thousand retirement-eligible GE employees on or around December 15, 1992. This package included a cover letter from Larry Phillips, Vice President of Human Resources at GE, a set of Benefit Questions and Answers, a brochure entitled 'A Guide to Retirement Choices,' and a videotape entitled 'The GE Aerospace/Martin Marietta Merger: Your Retirement Options.' GE Exs. 166-170. The videotape also utilized the "essentially equal" language, and in the context of an illustrative hypothetical, describes the future Martin plan as "identical" to the GE plan. GE Ex. 166 at GE04890, GE04895. The videotape explained that:

> Retirement is one of the biggest decisions you will make during your lifetime. And it is important to have as much information as possible. There is a lot of information in the material that came with this tape. More information from GE and Martin Marietta will follow. But for now you can be assured that you do not have to change your retirement plans due to the merger.

Id. at GE04909. The December Teaming Updates also informed GE employees that the last day they would be able to retire directly from GE would be the day before the merger closing date, at that time projected to occur on February 26, 1993. Pl. D. Ex. 128 at GE00819.

A Philadelphia Inquirer article dated January 13, 1993 reported that GE employees were still concerned about their pension benefits and the soundness of the Martin pension plan, and had authorized an employee group to obtain legal

representation. Pl. D. Ex. 131. In a teleconference hosted by GE's Gene Murphy, a transcript of which was created and distributed via e-mail, GE's Larry Phillips acknowledged these concerns in stating:

> That leads me to the other question which is fundamental uncertainty — uncertainty in the form of the rest of 1993. We published a statement that benefits will be substantially similar and everyone is asking the question, and rightly so, what does that mean. I hope we will have an answer to this in a week to ten days. Clearly the savings plan has to change because it is built around a GE plan with GE securities but the changes I expect to see will not be dramatically different than the GE Plan, but we will have wait (sic) until we see that in final form.

Pl. Ex. 4 (Pluta Aff.) at P00737. The record further indicates that over this time period, GE was pressing Martin to disclose further information about post-merger benefits in order to quell the apparent employee discontent. For instance, the Philadelphia Inquirer article mentioned above was faxed to Tom Kinstle at Martin with a hand-written note from GE's Larry Cook: "Per our earlier discussion, it's critical that MMC communicate "93 benefits" at the earliest opportunity." Pl. D. Ex. 131. Perhaps in response to such concerns, Martin CEO Norm Augustine issued a letter addressed to GE Aerospace employees on January 23, 1993. He assured GE employees that the pension benefits they have earned would be fully protected in the transaction, and indicated that the Martin plan was in a surplus position. Pl. D. Ex. 134. He

then went on to state that while Martin could not guarantee that the pension plan would never change, "it is our objective to provide each transferring GE employee, who later retires from Martin Marietta, with regular pension benefits no less than those that would have been received under the terms of the GE pension plan now in effect." Id. Plaintiff emphasizes an earlier draft of the Augustine letter, which read as follows:

> Allow me first to address the issue of pensions. The impact of this merger on the pensions of former GE employees can be described succinctly as none.

Pl. D. Ex. 58 (emphasis in original). This version, however, was not distributed to employees. Accompanying the Augustine letter that did go to employees was a series of "Talking Points" for managers, which included the following bullet points:

- The goal is to have identical or "substantially similar" benefits throughout 1993.

- The term "substantially similar" is used since, in some cases, identical benefits cannot be provided, as is the case with the Savings Plan since investment options in GE's S&SP are available only to active GE employees. There may be some other minor differences because of items such as insurance carrier requirements or systems differences.

Id. at GE02914. The talking points also acknowledged a "high level of frustration around the amount of pension and

benefit information that we have been able to provide to you," and cited the complexity of the deal as an explanation for the delay in providing information. Id.

Augustine's statement that Martin's pension would be "no less than" a GE pension also apparently sparked some concerns among GE employees, and on February 9, 1993 GE's Phillips circulated another question-and-answer series to managers to address any confusion. Pl. D. Ex. 68. The following exchange is included:

> Q: So what does Norm Augustine's statement about an objective of making a transferee's Martin Marietta Pension at least equal to my GE Regular Pension mean to me?
>
> A: It means that it is Martin Marietta's objective to provide you upon retirement from Martin Marietta with a Pension benefit which is no less than the Regular Pension that you would have received from GE using the formula in effect or implemented prior to that date.
>
> Q: Does that mean that Martin will use the GE formula in calculating my pension at retirement?
>
> A: Not necessarily. The Martin Pension Plan formula may be different, but the objective is to have the level of benefits provided be no less than what would have been provided if the 1993 GE Pension formula was used.

Id. at LMC3489-90.

*Appendix B*

A Martin Marietta planning document entitled "Merger Benefits Communications" was also prepared on February 12, 1993, aimed at "providing the various Martin and GE work teams with a sense of the benefits communication tasks which need to be completed in the next 60 days or so." Pl. D. Ex. 70 at LMC2945. The document stated that GE employees "are reported to be unsettled about their benefits and are looking for information to fill in the gaps." Id. at LMC2946. The document lists a number of Communication Objectives, including "reassure all [employees] that benefits will stay fundamentally the same" and "close any remaining communication gaps." Id. at LMC2948. The document also indicates that Martin knew from GE that some employees viewed the term "substantially similar" as ambiguous, and were "looking for a clear definition of exactly what 'substantially similar' benefits will mean to them for 1993." Id. A final table entitled "Open Issues" states that "the following open issues will be addressed and reworked weekly until closure is reached." Id. at LMC2976. The third item on this list asks "how can we define 'substantially similar' benefits?" No resolution date is entered in the adjoining column, nor is the item marked as "fixed" or "tentative." Id.

The February 19, 1993 Teaming Update informed GE employees that "the current GE formula will be used through June, 1994." Pl. D. Ex. 71 at LMC2013. The update also referred to Martin's "objective" to provide transferring employees with pension benefits which are "no less than" the benefits they would have received had they remained employed at GE. Id. During this approximate time period, Norm Augustine and Jack Welch went on the road, and made a series of presentations about the merger at various GE

facilities. The March 2, 1993 Teaming Update included a question-and-answer sequence from some of these presentations, including the following exchange:

> Q11: Some people are making important decisions about retirement, their savings and other things. Can we have a reasonable amount of time to make these decisions before we become Martin Marietta employees, and if so, how much time?
>
> A: There is ample time to make important decisions. We are using Teaming Update, as well as special mailings to employees' homes to provide details about matters affecting benefits as soon as information about them is available.

Pl. D. Ex. 138 at GE01081. The next Teaming Update on March 10, 1993 gave GE employees a "heads up," and notified them that information about Martin benefits would be distributed "by week of March 22." Pl. D. Ex. 139. On March 22, 1993 GE and Martin issued a "Special Edition" Teaming Update to notify employees that the transaction would not close before April 1, 1993, and that if the closing did take place on that date, "GE Aerospace employees who submit their paperwork before the close of business on Friday, April 2, 1993 . . . will retire under the GE Pension Plan." Pl. D. Ex. 141.

On March 23, 1993 a Teaming Update went out to GE employees detailing Martin benefits for transferring employees. The update again emphasized that if the closing went forward as anticipated on April 1, employees wishing

to retire with a pension benefit from GE had to complete their paperwork by the close of business on Friday, April 2, 1993. Pl. D. Ex. 142. The update went on to explain why the benefit summary was only now being released:

> As you will see from reading the following benefits information, most benefits remain the same with few exceptions. Many of you may question why it has taken so long to finalize this information and provide it to you since so little has been changed. Some insights into the process for developing the Martin Marietta benefits summary may be helpful to appreciate the amount of time required to deal with the many complex benefits details.
>
> There have been hundreds of hours of meetings among . . . managers from Martin Marietta, GE Corporate; and GE Aerospace headquarters. These meetings helped to familiarize Martin Marietta senior managers and professionals with the numerous details and provisions of the GE Benefit Plans. Then, Martin Marietta had to negotiate contracts with each of the suppliers/administrators for each benefits program . . . After each myriad set of details were decided upon, the communications were developed and reviewed by all the people involved in the decision-making process to ensure accuracy. . . .
>
> We understand how important your benefits are to you. That is why so much care and effort has

> gone into planning for the smooth transition of so many of the benefits-related services that many of you have come to expect. That doesn't mean there won't be some unforeseen glitches but certainly all those who have been involved in the transition process have tried their best to make the transition appear as seamless as possible for transferring employees.

Id. The attached benefits summary indicates that for 28 benefit programs, including the pension plan and medical benefits plan, "the benefits under these Martin Marietta plans, for employees of transferred GE operations and in effect for 1993, are the same as the comparable GE plans." Id. (emphasis in original). According to this summary, Martin's Security Life Insurance and Service Awards benefit programs would change, and Martin would eliminate three benefit programs previously offered by GE: Personal Excess Liability Insurance, the Product Purchase Plan, and Educational Loan Programs. Id. On March 31, 1993, GE and Martin announced that a 56-day "window period" GE had negotiated with the International Union of Electronic Workers would be extended to all non-bargaining employees. This "window period" would allow all transferred employees with five years of pension-qualified service to decide by May 30, 1993, to decide whether to retire from GE or continue working for Martin Marietta. Pl. D. Ex. 191.

The March 31, 1993 Teaming Update outlined the "window period," and provided that employees who had already submitted completed retirement forms could revoke their retirement election by contacting Human Resources by

the close of business on March 31, 1993. Although the time of distribution of this update is not clear, the facsimile header indicates that the notice was transmitted from Human Resources at 3:21 p.m. on March 31, 1993. Plaintiffs McGuire, Gilbert and Sedlacek testified that the information provided in the last two Teaming Updates was too late to be of any use, as for various reasons they had already planned for their retirement and completed the requisite paperwork. McGuire Dep. at 86-88; Gilbert Dep. at 36; Sedlacek Dep. at 67.

2. Plaintiffs' Evidence that Martin and GE had decided on benefits prior to the March 23, 1993 disclosure

Plaintiffs point to a number of instances in the record where either GE or Martin officials made reference to providing "mirror" benefits to transferring employees after the closing. For instance, Martin's Manager of Compensation and Benefits Planning Larry McAllister took notes during a December 8, 1992 telephone conference with GE's Larry Cook. Under the heading "Issues from Letter," McAllister made the following notations: "welfare plans — mirror" and "pension — same as now exist." Pl. D. Ex. 40. Cook's notes of the same conversation include 'mirror welfare plans and FSA [flexible spending account]" and "mirror pension." Pl. D. Ex. 115. Immediately after this meeting Cook prepared a memorandum for his superiors at GE indicating that "Bob McAllister, Manager — Compensation and Benefits Planning has confirmed Martin's intent to mirror all of the GE benefit plans and programs." Pl. D. Ex. 114. GE and Martin held a benefits planning meeting on December

15-16, 1992 at GE's Fairfield facility; the materials prepared for this meeting by Cook and Rick Dunn of GE describe Martin's post-merger benefit plans as "mirroring" GE's current benefits. Pl. D. Ex. 46. A December 18, 1992 letter from Dunn to Barreca, Cook and other benefits and human resources professionals at GE regarding the "Outcome of Martin Marietta Meetings — December 15-16, 1992" states that "with respect to the pension plan, there was no dispute that the only alternative was a 'mirror' of the GE Pension Plan through the end of 1993. The details are set out as with the [savings and pension plan option], but it appears to be less of a challenge in that the infrastructure is already in place for the Pension Plan." Pl. D. Ex. 48.

The record indicates that Martin was reluctant to agree to identical benefits. GE's Jerome Caplan testified that he did not think the December 15 meeting resulted in the agreement implied in the Dunn letter referenced above, as "there were a whole set of issues that Martin had regarding their inability to change even the smallest part of the smallest plan if they were linked to GE under the services agreement." Caplan Dep. at 145 (Def. Reply App. II). At his deposition Cook stated that he had not understood either McAllister's authority or the decision-making process at Martin at the time of the above memoranda and letters, and "any understanding I thought I had with McAllister did not, in fact, reflect the actual decision process in Martin Marietta." Cook Dep. at 81 (Def. Reply, App. II). Both GE and Martin officials testified that the Fairfield meeting revealed that Martin had not agreed on mirror plans, nor had the parties reached any agreement regarding what "substantially similar" meant. Cook Dep. at 86; Kinstle Dep. at 66 ("I would

comment that the word 'mirror' appears [in the December 15, 1992 meeting materials] several places and I don't recall — someone raised their hand and said 'the contract says substantially similar.' The chart was a GE chart and it was their view."). Kinstle also testified that Martin was bound to provide similar benefits, and that Martin's focus in December and January was on understanding GE's benefits and "the practicalities of administration . . . [and] actually delivering and determining the benefits and the insurance, the carriers and the providers." Kinstle Dep. at 45. While Kinstle could not identify a particular point at which Martin decided to offer a pension plan identical to GE's or medical insurance benefits identical to GE's, he did state that Martin did not want to deliver information about the new benefits "piecemeal," but wanted "to give participants a single document they could look to for the broadly based array of benefits they could expect. This (the March 23, 1993 Teaming Update [Pl. D. Ex. 142]) was the document that did that." Kinstle Dep. at 178.

C. Facts relating to plaintiffs' Partial Termination claim (Count II).

After the April 2, 1993 closing of the GE Aerospace/ Martin Marietta deal, the transferred employees became participants in the Trans Ops Plan, later named the Martin Marietta Corporation Retirement Income Plan. Following the GE transaction, Martin engaged in a series of business divestitures, consolidations, and mergers that resulted in the termination of some transferred GE employees. In March of 1995, Martin combined with Lockheed Corporation to become Lockheed Martin, and in April 1996 the Loral

Corporation merged into Lockheed Martin. As a result of these acquisitions and the continued decline in the defense budget, Martin announced a series of consolidations that resulted in the closing of a number of facilities and the termination of thousands of employees. See Pl. Ex. 10 at LMC 24147 (September 1993 Press Release announcing 5-year "Facilities Consolidation Plan" that was to result in the reduction of approximately 46,000 employees); id. at LMC 24143 (June 1995 Press Release regarding corporate-wide consolidation plan that would eliminate 12,000 positions over next five years); id. (Printout from PR Newswire Web Site announcing additional consolidation actions to fully integrate Loral). Plaintiffs' actuarial expert Michael Greenstein analyzed the data regarding employment terminations from Martin for the period from April 5, 1993 to December 31, 1997 and determined that the Martin Plan's active participants declined by 44.8 percent. Greenstein's calculations are based on "selected exits;" that is, employees who terminated employment for reasons other than death, disability retirements, and retirements at normal retirement age. Greenstein Report, Pl. Ex. 3. Martin's analysis reaches a different result, because it excludes terminations attributable to additional reasons, such as terminations resulting from intracompany transfers, resignations, performance-related terminations, and all retirements except retirements in lieu of lay-off and retirements where no specific reason was given by the terminating employee. "Martin Ex. GG. The Martin data show a reduction of 20.3 percent over the entire period, and no more than 15.9 percent in any three-year period.

*Appendix B*

Certain plan benefits present in the GE Plan, such as the Special Early Retirement Option ("SERO") and the Plan Closing Pension Option ("PCPO"), were eliminated by Martin. Martin Ex. II, JJ. The Martin plan has also been amended to provide a right of reversion to Martin of some of the surplus assets of the Plan in the event of a Plan termination, although the Plan language expressly forbids any of the transferred GE Plan assets from reverting to Martin. Martin Ex. JJ at 69.

## II. STANDARD

Federal Rule of Civil Procedure 56(c) provides that a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See *Silver v. City Univ.*, 947 F.2d 1021, 1022 (2d Cir. 1991). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." *Rodriguez v. City of New York*, 72 F.3d 1051, 1060 (2d Cir. 1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *Brady v. Town of Colchester*, 863 F.2d 205, 210 (2d Cir. 1988).

*Appendix B*

## III. DISCUSSION

### A. Prudence Attack on T-Bill Investment (Count III): Defendant Martin's Motion for Summary Judgment

Defendant Martin makes three arguments in support of its position that it is entitled to summary judgment on Count Three of the complaint. First, Martin alleges that plaintiffs' prudence challenge to the segregation of the $1 billion and investment in T-bills is in reality a veiled attack on the amount of the transfer, and thus an attempt to circumvent the Court's earlier ruling that plaintiffs do not have a claim to the residual assets in the GE plan. Second, Martin argues that it was not a fiduciary of the GE Plan at the time of the challenged investment, as it did not exercise any discretionary control or authority over the plan assets. Finally, Martin claims that plaintiffs' attempt to impose "knowing participation" liability on a non-fiduciary is unavailing, because recent Supreme Court and Court of Appeals precedent indicate that such a claim is no longer viable under ERISA. As Martin's first argument is addressed in the context of the Court's discussion of GE's summary judgment motion, see infra at 39, the Court will only address Martin's arguments regarding its fiduciary status.[2]

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2. At oral argument, Martin took the position that it cannot be held to fiduciary standards for any conduct prior to the closing, since none of the plaintiffs were Martin employees at that time. However, since Martin only briefed this argument in connection with Count I, the failure to provide information claim, it is addressed in that context, see infra at 50.

*Appendix B*

1. Was Martin a fiduciary of the GE Plan at the time of the T-bill investment?

To the extent that plaintiffs seek damages from Martin for the losses resulting from segregating the $1 billion transfer amount and investing in T-bills, the Court must determine whether Martin acted as a fiduciary in negotiating for the transfer. Under ERISA, there are three ways to acquire fiduciary status: being named in a plan as a fiduciary, being named as a fiduciary pursuant to a procedure specified in a plan, or performing "fiduciary" functions. See 29 U.S.C. §§ 1002(21)(A) and 1102(a)(1). The parties appear to agree that it is the third category that applies. Under this provision,

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1102(21)(A). Plaintiffs claim that disputed issues of fact exist as to whether Martin exercised "discretionary authority" over the pension funds by contracting with GE to have the one billion transfer amount invested in T-Bills prior to the closing.

The Second Circuit has recognized that "Congress intended ERISA's definition of fiduciary 'to be broadly construed.' " *Lopresti v. Terwilliger*, 126 F.3d 34, 40 (2d

Cir. 1997). The Lopresti court employed a functional analysis to determine that a company officer was a fiduciary, even though he did not administer the funds of the plan, because he made the decisions about which creditors to pay out of the general company account, and had used the plan assets to pay company creditors rather than forwarding those assets to the pension plan at issue. Id. at 41. Even though the second defendant had the authority to sign checks, however, the Second Circuit held that he was not a fiduciary, because while "he had some general knowledge that deductions were made from employees' wages," he primarily was involved in production and had no responsibility for determining which of the company's creditors would be paid or in what order. Id. at 40. Similarly, in *Blatt v. Marshall & Lassman*, 812 F.2d 810 (2d Cir. 1989), the defendant principals of an accounting firm were found to have exercised actual control over plan assets when they intentionally delayed executing certain forms that were necessary for the plaintiff to withdraw funds from the plan, in order to gain collateral advantage in an unrelated state court suit brought by the plaintiff against the firm. Id. at 812. Blatt noted that "an entity need not have absolute discretion with respect to a benefit plan in order to be considered a fiduciary;" rather, "fiduciary status exists with respect to any activity enumerated in the statute over which the entity exercised discretion or control." Id.

Plaintiffs rely on the above cases and argue that Martin had de facto control over the assets in this case, in that it entered into a transaction agreement that obliged GE to "cause the trustee of the GE Pension Plan to" segregate $1 billion in cash and invest such assets in 90-day treasuries. The plaintiffs point to deposition testimony by GE Plan

trustees that the segregation of the $1 billion from general plan assets and investment in T-bill would not have occurred but for the Transaction Agreement. Cosgrove Dep. at 99. Certain GE draft letters of agreement and internal memorandum also indicate that the disinvestment of the transfer amount resulted solely from the Transaction Agreement. Pl. D. Ex. 88 (Memorandum to GE Plan trustees MacDougall and Bolton stating that "until the assets are released to Martin Marietta . . . upon the consummation of the sale, they will remain within GE Pension Trust under the investment control of Bob MacDougall based on the guidelines established by Martin Marietta"); Pl. D. Ex. 15 (GE draft letter of agreement dated March 29, 1993 noting that "on December 31, 1992, pursuant to the Transaction Agreement, the Trustees caused the segregated assets to be invested in a Treasury Bill.") Essentially, plaintiffs' argument is that by entering into a contract with GE, Martin became a fiduciary because the resulting transaction agreement affected the disposition of assets under the plan.

Based on the above-described record, the Court concludes that the evidence offered is insufficient to demonstrate Martin's actual control over the GE Plan. First, applicable Second Circuit precedent undermines the central tenets of plaintiffs' claim. *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987) involved a provider of administrative services who sued the trustees of a pension plan for breach of a contract, and was countersued by the trustees who claimed that the provider was a fiduciary as a matter of law, and was thus liable for having caused the plan to agree to pay it excessive compensation. Id. at 1258. The district court refused to

instruct the jury that as a matter of law, the administrative services provider was a fiduciary with respect to the plan, and the Second Circuit affirmed. The Second Circuit held that:

> When a person who has no relationship to an ERISA plan is negotiating a contract with that plan, he has no authority over or responsibility to the plan and presumably is unable to exercise any control over the trustees' decision whether or not, and on what terms, to enter into an agreement with him. Such a person is not an ERISA fiduciary with respect to the terms of the agreement . . . .

Id. This rationale is analogous to the instant circumstances, where a corporate entity (Martin) is negotiating a contract with an entity whose roles include plan administration (GE). While a contracting party may become a fiduciary after entering into the agreement if, pursuant to the agreement, it has control over certain aspects of the plan, see id., throughout the course of the negotiations Martin had no authority to compel GE to reach an agreement or to agree to its terms. Under these circumstances, mere negotiation of the Transaction Agreement with GE did not confer fiduciary status upon Martin.

This conclusion is consistent with parties' obligations under the terms of the Transaction Agreement. The employee benefits portion of the agreement clearly states that the investment will be made "in each case to the extent consistent with GE's fiduciary obligations under ERISA," Pl. D. Ex. 87 at LMC2512, and the section immediately following states

that if a different strategy than the T-bill investment is chosen by both Martin and GE, then Martin will accept fiduciary status with respect to the GE Plan. Id. at LMC2513. Thus the contract recognized that the T-bill investment was to be subjected to an independent determination by the fiduciaries of the GE Plan, and that Martin would only become a fiduciary upon its participation in a decision to invest the funds in a different manner. Plaintiffs argue, and their expert opines, that the terms of the contract required the GE Plan trustees to relinquish their investment authority and discretion in order to carry out the T-bill investment. Pl. Ex. 2 at 12; Gordon Dep. at 382. However, the plain language of the contract conditions the T-bill investment on compliance with GE's fiduciary obligations, an interpretation borne out by the testimony of the trustees that they independently examined other investment options before deciding to utilize the transfer mechanism specified in the Transaction Agreement.

While it is clear that a party cannot contract away its fiduciary obligations arising from its exercise of discretionary authority or control, the contract at issue here is the sole source of plaintiff's contention that Martin was a fiduciary with respect to the T-bill investment, as conceded by plaintiffs' own expert during his deposition.[3] It is appropriate, therefore, to examine the contract language to determine whether particular individuals are fiduciaries under ERISA.

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3. Gordon Dep. at 387 (Q: ". . . you testified earlier that your opinion concerning Martin Marietta is not based on any fact other than the fact that Martin Marietta entered into the transaction agreement containing the provisions in question, correct?" A: "That is correct.").

See *Lowen v. Tower Asset Mgmt.*, 829 F.2d 1209, 1218 (2d Cir. 1987) (looking to terms of contract with plan to find that defendant investment company was "investment manager" and thus a fiduciary under ERISA). Further, the deposition testimony of negotiators and officers on both sides of the GE/Martin deal demonstrates that Martin continually refused to accept fiduciary responsibility for the transfer amount, insisting that a sum certain be available in cash or cash equivalents at the closing. The record also indicates that Martin did not push for the T-bill investment; rather, that investment was a compromise given Martin's conditions that it not accept market risk and that a set amount be readily available at the closing to establish Martin's new plan. This evidence of the intent of the parties, further bolstered by the contract construction outlined above, supports the conclusion that no pre-closing ERISA obligations were incurred by Martin as a result of the purchase and sale transaction with GE.

Thus, as a matter of law, Martin was not acting as a fiduciary when it entered into the transaction agreement requiring the GE Plan trustees to segregate $1 billion and invest it in T-bills, "consistent with the GE's fiduciary obligations under ERISA." Pl. D. Ex. 87.

2. Can Martin be Liable for "Knowing Participation" in a fiduciary breach by GE?

Even if Martin was not a fiduciary with regard to the T-bill investment, plaintiffs claim that it can still be held liable for knowingly participating in GE's fiduciary breach under § 502(a)(3). Defendants argue that "knowing

participation" claims against non-fiduciaries are no longer cognizable after the Supreme Court's decisions in *Mertens v. Hewitt Assoc. Inc.*, 508 U.S. 248, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993) and *Central Bank of Denver N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S. Ct. 1439, 1447, 128 L. Ed. 2d 119 (1994). Several circuits and district courts have agreed. See *Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1994); *Reich v. Continental Cas.*, 33 F.3d 754, 757 (7th Cir. 1994); *Reich v. Compton*, 57 F.3d 270, 283 (3rd Cir. 1994); *Aiena v. Olsen*, 69 F. Supp. 2d 521, 533 (S.D.N.Y. 1999).

Even if such a claim is still cognizable in this circuit after Mertens, an essential element is an underlying breach by a fiduciary, in this case GE. See *Diduck v. Kaszycki*, 974 F.2d 270, 281-82 (2d Cir. 1992) (laying out well-established elements of cause of action for knowing participation in fiduciary breach under ERISA). The Court will therefore first resolve the predicate question of whether GE breached its fiduciary duties.

B. Prudence Attack on T-bill investment (Count III): GE's Motion for Summary Judgment

GE, in contrast to Martin, was indisputably a fiduciary at the time of the challenged T-bill investment. Plaintiffs claim that GE disregarded the interests of the participants in order to advance its corporate goal of closing the deal with Martin, thereby breaching its fiduciary obligations, obligations the Second Circuit has described as "the highest known to law." *Donovan v. Bierwirth*, 680 F.2d 263, 272, n.8 (2d Cir. 1982), cert. denied, 459 U.S. 1069, 74 L. Ed. 2d 631, 103 S. Ct. 488 (1982). Donovan further explained the statutory sources of this high duty:

> [ERISA] Sections 404(a)(1)(A) and (B) impose three different although overlapping standards. A fiduciary must discharge his duties 'solely in the interests of the participants and beneficiaries.' He must do this 'for the exclusive purpose' of providing benefits to them. And he must comply 'with the care, skill, prudence, and diligence under the circumstances then prevailing' of the traditional 'prudent man.'

Id. at 271. Plaintiffs cite to a myriad of cases emphasizing the gravity of the strict duties governing ERISA fiduciaries. See e.g. *John Blair Communications v. Telemundo Group*, 26 F.3d 360, 367 (2d Cir. 1994) ("Where fiduciary duties arise under ERISA, they must be enforced without compromise to ensure that fiduciaries exercise their discretion to serve all participants in the plan"); *Reich v. Valley National Bank*, 837 F. Supp. 1259, 1286 (S.D.N.Y. 1993) (A significant purpose of ERISA is to "immunize an employee benefit plan from the employer's interest," and so the statute "requires conformity to extremely high standards."); *Masella v. Blue Cross & Blue Shield of Conn.*, 936 F.2d 98, 107 (2d Cir. 1991) (Because ERISA "abounds with the terminology of trust law," application of rule of contract interpretation construing ambiguities against insurer "is consistent with the basic principle of trust law that trust property is to be dealt with for the benefit of the beneficiary.").

The investment decisions of fiduciaries are likewise held to a high standard, although the ultimate outcome of an investment is not proof of imprudence or breach of fiduciary

duties. *DeBruyne v. Equitable Life Assurance*, 920 F.2d 457, 465 (7th Cir. 1990). In making investment decisions, trustees must conduct a "careful and impartial investigation," with "an eye single to the interests of the participants and beneficiaries." *Bierwirth*, 680 F.2d at 271. If the trustees perceive that they may be biased in favor of a particular investment course due to corporate interests, they are "bound to take every feasible precaution to see that they had carefully considered the other side. . . ." Id. at 276. In applying the prudent person standard of the statute to investment decisions, "[a] fiduciary's independent investigation of the merits of a particular investment is at the heart" of the inquiry. *Valley National Bank*, 837 F. Supp. at 1273. Even if a fiduciary has failed to adequately investigate a particular investment, however, a reviewing court must consider whether, considering the facts that an adequate and thorough investigation would have revealed, the investment was objectively imprudent. *United States v. Mason Tenders*, 909 F. Supp. 882, 887 (S.D.N.Y. 1995), citing *Fink v. National Savings and Trust Co.*, 249 U.S. App. D.C. 33, 772 F.2d 951, 962 (Scalia, J., concurring in part and dissenting in part). The Second Circuit's leading decision on fiduciary investment duties describes the standard as follows:

> The court's task is to inquire "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir.1983), cert. denied, 464 U.S. 1040, 104 S. Ct. 704, 79 L. Ed. 2d 169 (1984). *Donovan v.*

> *Cunningham*, 716 F.2d 1455, 1467 (5th Cir.1983) ("courts have focused the inquiry under the 'prudent man' rule on a review of the fiduciary's independent investigation of the merits of a particular investment"). A trustee's lack of familiarity with investments is no excuse: under an objective standard trustees are to be judged "according to the standards of others 'acting in a like capacity and familiar with such matters.' " *Marshall v. Glass/Metal Association*, 507 F. Supp. 378, 384 (D.Haw.1980).

*Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984), cert. denied by *Cody v. Donovan*, 469 U.S. 1072, 83 L. Ed. 2d 506, 105 S. Ct. 565. Under these standards, plaintiffs claim that the record demonstrates triable factual issues on whether the GE fiduciaries violated their duties in segregating the $1 billion initial transfer amount and investing it in T-bills, rather than leaving it in the fully invested GE portfolio.

Defendant responds by distinguishing between fiduciary conduct that is subject to ERISA's requirements and settlor conduct that is not. The Court's ruling on the motions to dismiss concluded that "GE's statutory duties in the decisions at issue — i.e., the decision to transfer the assets to a new plan and the decision as to the amount transferred — are limited to the requirements set forth in Section 208." Ruling on Motion to Dismiss (Doc. # 144). Thus GE argues, given its compliance with Section 208, Martin and GE were free as settlors to negotiate the Transaction Agreement, set the valuation date, and agree that $1 billion plus 90-day Treasury Bill interest would be transferred at the closing. According

to defendants, this conclusion necessarily follows from both the Court's earlier ruling and from the Supreme Court's observation in the intervening Hughes Aircraft decision that:

> In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets. . . . ERISA's fiduciary duty requirement is simply not implicated where [the employer], acting as the plan's settlor, makes a decision regarding the form or structure of the plan . . . .

119 S. Ct. at 763.

The Second Circuit has since confirmed that § 208 does not require distribution of a plan's residual assets upon a merger. *Brillinger v. General Elec. Co.*, 130 F.3d 61, 64 (2d Cir. 1997), cert. denied, 525 U.S. 1138, 143 L. Ed. 2d 37, 119 S. Ct. 1025 (1999). However, in ruling on the prior motions to dismiss, this Court noted the possibility that plaintiffs could demonstrate a fiduciary breach, even given GE's undisputed compliance with § 208. See Ruling on Motion to Dismiss (Doc. # 144). The question remains whether GE acted prudently and in accordance with its fiduciary obligations when, faced with the settlor requirement that it transfer $1 billion plus T-bill interest at a closing that was anticipated to occur within the first quarter of the next year, it made the decision to liquidate $1 billion of the plan's assets and invest the amount in 90-day Treasury bills.

Plaintiffs seem to accept this delineation, as the bulk of their argument focuses on the T-bill investment. According to plaintiffs, GE committed a fiduciary breach when it disinvested the $1 billion and basically, as they characterize it, held it in cash for a calendar quarter, regardless of the terms of the Transaction Agreement. The fact that the Agreement provided that such investment was to be made "consistent with GE's fiduciary duties under ERISA" is proof, to plaintiffs, that GE itself recognized that the investment decision was not immune from fiduciary oversight simply because it was made in connection with a corporate asset transfer. This point is not seriously disputed by the parties, as the GE trustees all testified to making an independent review before deciding to go through with the T-bill investment. Nor is it disputed that the T-bill investment resulted in substantially less being transferred to the new Martin plan than would have been the case had the $1 billion remained invested in GE's regular portfolio, and then been transferred along with all interest attributable to that amount stemming from the plan's regular investments. Where plaintiffs and defendant sharply diverge is whether the GE trustees, and GE itself as a fiduciary, should have overridden the deal struck in the Transaction Agreement, and borne the investment risk of keeping the transfer amount invested in the market, and then transferred the increased amount to the Martin plan at the closing. See Pl. Mem. in Opp., p. 27 ("Had defendants not caused the disinvestment, the GE Plan would have transferred the [increased] earnings to the Martin plan, just as the draft Agreements proposed.").

The logical problem with plaintiffs' argument is that it does, when stripped to its essence, seek to overturn GE's

negotiated decision as a settlor to transfer a fixed amount at the closing. Had GE determined that the T-bill investment was not prudent, and kept the $1 billion in the Plan's investment portfolio, they would still have only been obligated to transfer that amount plus the T-bill interest rate at the closing, according to the terms of the Transaction Agreement. Martin rejected any offers to accept market risk on the transfer amount, demanding instead a fixed amount liquidated on the closing date, and as such would have had no rights to any additional investment returns generated had GE invested the transfer amount differently than set out in Agreement. Plaintiffs do not dispute that the initial transfer amount of $1 billion plus T-bill interest, when combined with the residual transfer, met the requirements of Section 208, and therefore any additional investment returns could have simply remained with the GE Plan without violating ERISA. See *Systems Council EM-3 v. AT&T Corp.*, 333 U.S. App. D.C. 63, 159 F.3d 1376 (D.C.Cir. 1998) (plaintiffs' fiduciary and § 208 challenge to asset transfer approach during pension plan spin-off dismissed; even though valuation method utilized did not provide plaintiffs with 'benefit of actual market earnings' on transferred assets during interim period, plaintiffs are not entitled to the benefit of any interim increase since, as participants in defined benefit plan, they are entitled only to the level of benefits promised under the plan); *John Blair Communications v. Telemundo Group*, 26 F.3d 360 (2d Cir. 1994) (finding that defined contribution spinoff plan was in violation of § 208 when amount transferred did not reflect gains occurring during the interim period before the actual transfer, but noting that if defined benefit plan were at issue, as here, "it would matter little to the individual [spinoff plan] participants whether the plan lost out on roughly $500,000

as long as those members were guaranteed their promised benefits at retirement.").

Although plaintiffs seek to obfuscate the issue with references to the trustees' inexperience in transfers of this magnitude and allegations that the trustees allowed GE's corporate interests in the merger to dominate its consideration of the investment decision, plaintiffs have not analytically separated out the settlor decision to make the asset transfer from the GE Trustees' fiduciary obligations within the context of that transfer. Plaintiffs charge that "settlors do not invest and disinvest plan assets — fiduciaries do," but this is a distinction without a difference, given that the investment decision was part of the mechanism by which a § 208-compliant merger was realized. Plaintiffs have not cited to any cases requiring a plan to transfer more assets than § 208 requires due to the fiduciary obligations of the transferring plan.

This essential flaw in plaintiffs' argument can be seen, in its most crystalline form, in the nature of the recovery sought and the identity of the plaintiff class seeking to recover it. The sub-class consisting of former GE employees who transferred to Martin pursue the imprudent investment claim. They seek the approximately $34 million in market gains allegedly lost due to the T-bill investment, and they seek these damages for the Martin plan. As pointed out by GE, the relevant ERISA provision makes a breaching fiduciary "personally liable to make good to such plan any losses to the plan resulting for each such breach." 29 U.S.C. § 1109(a). The alleged breach in this case occurred on December 31, 1992, the date on which the $1 billion was segregated from

the GE Plan and invested in T-bills. At that point, the Martin pension plan for the transferred employees had not yet come into existence, and therefore any losses due to a fiduciary breach would have been sustained by the GE Plan, and would have to be restored to that plan. Neither the Transaction Agreement governing the merger nor § 208 require that Martin receive any additional funds, even if had GE breached its fiduciary obligations in making the T-bill investment.

The Court also finds persuasive GE's argument regarding the inequity of awarding damages to the Martin Plan in these circumstances. As explained by the negotiations leading up to the Transaction Agreement described above, Martin only would have received additional interest if it had agreed to accept market risk on the $1 billion, a position it specifically rejected. If plaintiffs were allowed to proceed to trial, and prevailed on their claims, Martin would be granted an unwarranted windfall: after refusing to accept investment risk during the negotiations, it would now receive those funds risk-free, placing its Plan in a position of substantial overfunding and thus relieving Martin of the need to make further contributions. Such a result is not contemplated by either ERISA or by the fiduciary/settlor distinction drawn by the Supreme Court in Hughes Aircraft.

Plaintiffs nonetheless contend that had GE decided to keep the $1 billion initial transfer amount invested in its regular portfolio, the increased returns would have flowed to the new Martin Plan, despite the explicit language of the Transaction Agreement, based solely on the traditional trust rules embodied in the phrase "interest follows principal." Plaintiffs cite to *Phillips v. Washington Legal Foundation*,

524 U.S. 156, 141 L. Ed. 2d 174, 118 S. Ct. 1925 (1998), a case in which the Supreme Court concluded that interest on clients' trust accounts constituted private property, for purposes of the "takings" clause of the Fifth Amendment. As a basis for its decision, the Court noted "the rule that "interest follows principal" has been established under English common law since at least the mid-1700's." Id. at 165. The Court also cited to numerous state court decisions recognizing this rule in their common law, including a Connecticut Appellate Court case observing "as long as the attached fund is used for profit, the profit . . . is impounded for the benefit of the attaching creditor and is subject to the same ultimate disposition as the principal of which it is the incident." Id., quoting *Vidal Realtors of Westport v. Harry Bennett & Assoc.*, 1 Conn. App. 291, 297, 471 A.2d 658 (1984).

While a correct statement of the law, plaintiffs' argument is far too slender a strand on which to predicate the allocation of an additional $34 million to the Martin plan. Phillips and Vidal Realtors involve attempts to determine ownership of the interest earned during a time period where the ownership of the principal itself was beyond dispute. In Phillips, the client funds at issue were unquestionably the property of the clients, and were merely held in trust by the attorney pending distribution. 524 U.S. at 160. In Vidal Realtors, a number of brokers laid claim to a $51,000 commission for a real estate sale, and because of the conflicting claims, the seller refused to pay the commission, although it was admittedly due, and instead placed the amount in an escrow account. 1 Conn. App. at 292. Upon resolution of the underlying dispute, the seller refused to turn over the $51,000 unless it could retain $8,000 in accrued interest for itself. The trial

court ordered the seller to relinquish the interest, and the Appellate Court affirmed, finding that the defendant, as a garnishee, was not entitled to retain the accrued interest. Id. In contrast, Martin had no claim to the $1 billion transfer amount until the transaction closed; had the deal gone sour for GE and Martin, GE clearly would have retained both the $1 billion and any interest accrued. This is not a case where a party temporarily holds another individual's property in trust, as in Phillips, or where an acknowledged debt is due and owing, as in Vidal Realtors. Viewed simply, Martin and GE contracted for the exchange of a certain sum of money, and allocated the investment returns on that sum accordingly. Phillips and Vidal Realtors cannot trump the basic principles of contract interpretation, nor do they require GE to deliver to Martin more than it bargained for, potentially to the detriment of the remaining GE Plan participants.

The Court concludes that even assuming that the T-bill investment was imprudent, this class of plaintiffs cannot recover the relief they seek for the Martin Plan. GE's Motion for Summary Judgment on Count III is therefore GRANTED. As any claim that Martin knowingly participated in GE's breach would be derivative of their claim against GE, even if such a claim is still cognizable, Martin's Motion for Summary Judgment on Count III is GRANTED as well.

C. Failure to Provide Information Claim (Count I): Defendant Martin's Motion for Summary Judgment.

Martin contends that no disclosure claim lies in the circumstances of this case, where GE employees were informed that pension benefits would be the same a month before the closing, and were given repeated assurances that

the benefits at Martin would be 'substantially similar' and 'essentially equal' to those at GE. This argument will be evaluated in the context of GE's motion for summary judgment on the same grounds.

Martin asserts that even independent of the merits of plaintiffs' disclosure claim, it is entitled to summary judgment because it owed no fiduciary duties to Sub-class One plaintiffs. These plaintiffs were never employed by Martin and never participated in any Martin plan, and according to Martin, it owes no fiduciary duties at all to prospective employees. In support of this position, Martin refers to the definition of participant in ERISA, 29 U.S.C. § 1002(7): "any employee or former employee . . . who is or may become eligible" for benefits. While plaintiffs in Sub-class One certainly fit into the latter part of this definition, in that during the relevant time period they may have "become eligible" for Martin benefits had they accepted employment, they were not employees or former employees of Martin at the time the alleged misrepresentations were made. Were this Court to disregard the language of the statutory definition and extend fiduciary duties to potential employees, Martin contends, a string of deleterious consequences would result, from job offerees who decline employment suing employers for misrepresentations during the interview process, to the spectre of increased liability negatively affecting employers' willingness to maintain benefit plans at all.

Plaintiffs seek to avoid the effect of the statutory language by pointing to a number of cases in which plaintiffs not yet participants in ERISA plans have sued for misrepresentations related to the nascent plans. In each of these

cases, however, the plaintiffs alleging fiduciary breaches were at least employees of the defendant and participants in the defendant's benefit plans at the time of the challenged communications, if not yet participants in the particular plan at issue. See *Varity Corp. v. Howe*, 516 U.S. 489, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996) (communications to current employees regarding benefit plans at successor company); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130, 132 (3rd Cir. 1993) (communications to current employees considering retirement regarding changes in early retirement benefits), cert. denied, 510 U.S. 1020, 126 L. Ed. 2d 586, 114 S. Ct. 622 (1993); *Curcio v. John Hancock Mut. Ins. Co.*, 33 F.3d 226, 234-35 (3rd Cir. 1994) (misrepresentations to defendant's employees at time employees given opportunity to enroll in new life insurance plan); *Smith v. Hartford Ins. Group*, 6 F.3d 131, 136 (3rd Cir. 1993) (misrepresentations at time employees given choice to enroll in new medical plan). Plaintiffs have not directed the Court toward, nor has the Court been able to locate, any cases where fiduciary duties attached to communications by a potential or future employer.

The case containing language arguably supportive plaintiffs' claim is Firestone v. Bruch, in which the Supreme Court defined participant to mean "employees in, or reasonably expected to be in, currently covered employment," 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989), quoting *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985) (former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits is not "participant" within meaning of statute). Bruch, however, addressed only the question of what showing a claimant must make in order

to be entitled to receive information under 29 U.S.C. § 1024(b)(4), and involved former employees who had been re-hired by the purchasing company. Saladino, the Second Circuit decision quoted by the Supreme Court in articulating this definition of participant, and also involving a former employee, noted that given the numerous obligations ERISA places on plan sponsors and fiduciaries vis-a-vis plan participants, such a group should be "easily identifiable" in order to provide certainty as to an employer's statutory obligations and to reduce costs to pension plans. 754 F.2d at 476. Expanding this group to include potential or future employees would undermine these goals.

Even though the GE employees who were contemplating a transfer to Martin were "easily identifiable," the fact remains that none of the Sub-Class One members accepted Martin's offer of employment. Allowing them to impose fiduciary obligations on Martin under these circumstances would greatly extend the scope of the statute to include an ever-expanding universe of potential or future employees, in derogation of the statutory definition and the cases interpreting it. It is unfortunate for Sub-class One members that the very uncertainty regarding their status that may have prompted their retirement results in their exclusion from the protections of ERISA, but the Court cannot vault over the plain language of the statute in order to obtain what plaintiffs view as an equitable result.[4] In light of the precedent

4. Alternative remedies for such nonparticipant future employees may be available under state common law causes of action for fraudulent, intentional or negligent misrepresentation or promissory estoppel, if such claims did not "relate to" an ERISA plan for the purposes of preemption.

discussed above and the statutory definition at the heart of this dispute, the Court is persuaded that Martin's argument that Martin cannot be considered a fiduciary for potential employees prior to any of the plaintiffs becoming employees is the correct view.

Plaintiffs also allege Martin's knowing participation in this fiduciary breach, so as was the case with the prudence challenge to the T-bill investment, Martin's summary judgment motion must be evaluated in the context of GE's parallel motion, discussed infra.[5]

D. Failure to Provide Information (Count I): Defendant GE's Motion for Summary Judgment.

In the September 1997 ruling on defendants' second motions to dismiss, this Court allowed plaintiffs' disclosure claim to stand, because it was "at least minimally pleaded to survive a motion to dismiss" insofar as the claim alleged that defendants' assurances about the provision of

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5. While the Court need not reach the question, given its resolution of GE's summary judgment motion, see infra, the situation of the plaintiffs in this case illustrates the equity of preserving a cognizable claim under ERISA against third parties who knowingly participate in a fiduciary breach. Martin does not deny that it played a significant role in formulating and approving the Teaming Updates and other communications, nor that there was a substantial likelihood that some recipients of those communications would become Martin employees in the near future. Simply put, the employees of GE's Aerospace division were as close to being Martin employees as they could possibly be, without having yet signed on the dotted line. "Knowing participation" would allow participants to reach the conduct of such almost-fiduciaries, if an underlying breach is found.

information, like the misrepresentations in *Ballone v. Eastman Kodak*, had "no reasonable basis in fact." 109 F.3d 117, 126 (2d Cir. 1997). Ruling on Motion to Dismiss (Doc. # 160) at 7. The Court noted, however, that plaintiffs must be able to show after discovery that "1) they were promised certain material information; 2) that the defendants had that material information, and 3) that the defendants misled the plaintiffs as to what the information was or withheld the information." Id.

Plaintiffs argue that they have met this standard, because the discovery record shows that Martin knew it would be providing identical benefits to those provided by GE, yet only disclosed that fact late in the process, and instead utilized "weasel words" such as 'substantially similar' and 'essentially equal' prior to that point. GE responds that it neither promised that information would be provided within a particular timeline, nor did it withhold any information concerning Martin benefits; in fact, GE argues, they could not have made any assurances about Martin's benefits, because such decisions were wholly within Martin's control. GE also urges the Court to grant summary judgment and reject plaintiffs' attempt to impose what it sees as "broad new disclosure requirements." No court has ever based a finding of fiduciary breach on such a diffuse claim as failure to provide information in a sufficiently prompt fashion, GE argues, when relevant material information was provided to all participants before any decision was required of employees.

The volume of case law on the subject demonstrates the importance of fiduciary obligations in the context of

communicating about benefits. Under *Varity Corp. v. Howe*, 516 U.S. 489, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996), communicating information about future plan benefits is a fiduciary function. *Ballone v. Eastman Kodak Co*, 109 F.3d 117, 123 (2d Cir. 1997) emphasized the principle that fiduciaries can be held liable for statements pertaining to future benefits, when the fiduciary knows those statements are false or have no reasonable basis in fact. 109 F.3d at 126. While under *Pocchia v. NYNEX Corp.*, 81 F.3d 275 (2d Cir. 1996), cert. denied, 519 U.S. 931, 136 L. Ed. 2d 220, 117 S. Ct. 302 (1996), an employer has no duty to voluntarily disclose information about future changes prior to plan adoption, the Second Circuit has held fiduciaries liable for nondisclosure of information about a current plan even in the absence of a specific request, when the omitted information was necessary to an employee's decision about retirement. *Becker v. Eastman Kodak Co.*, 120 F.3d 5 (2d Cir. 1997). It is under these principles that the current claim must be viewed.

Plaintiffs urge this Court to deny both GE and Martin's motions for summary judgment, arguing that they have presented triable factual issues on all the elements articulated in this Court's ruling on the motion to dismiss. First, plaintiffs claim that the Teaming Updates indisputably demonstrate that plaintiffs were promised they would be given material information about the benefits that Martin would provide in a sufficiently prompt manner to allow them to make employment decisions. The inaugural Teaming Update, for instance, told employees that they would be provided with "regular and complete reports" of the merger and that they would "receive comprehensive information on

your benefits." Pl. D. Ex. 35. In the December 10, 1992 issue defendants stated that it was their "intention to keep you as fully informed as possible . . . as information becomes available," Pl. D. Ex. 126, while the March 2, 1993 issue assured employees that "there is ample time to make important decisions" and that GE and Martin were utilizing the Teaming Update and special mailings to employees' homes to provide benefits information "as soon as information about them is available." Pl. D. Ex. 138. While these statements do not amount to an unequivocal promise to provide any and all relevant information, a reasonable fact-finder could interpret them as a representation that information would be communicated in a timely fashion. Any such promises were certainly qualified, however, by defendants' reminders that some complicated questions, such as benefits questions, would take longer to answer, as the merging companies "want to respond quickly to those concerns, but more importantly, we want our responses to be correct." Pl. D. Ex. 35.

The second element set out in the Court's earlier ruling requires plaintiffs to demonstrate that defendants actually had the material information that was promised. Plaintiffs claim that they have met this burden by providing evidence from which a reasonable fact-finder could conclude that Martin knew it had no choice but to provide identical benefits to the transferring GE employees, and that GE shared this understanding. Plaintiffs point to that portion of the Transaction Agreement which requires GE and Martin to enter into a benefit administration agreement "whereby GE shall provide investment, management, and administrative services with respect to benefit plans and arrangements

adopted by the Parent. . . ." Pl. D. Ex. 1 at GE 00975, P V.04(c). Plaintiffs argue that this language demonstrates that defendants knew "that Martin had no practical alternative to continuing the exact same GE benefits," a conclusion they allege is confirmed by the deposition testimony of various Martin personnel that they had not considered changing GE's benefits. See Kinstle Dep. at 46-47, Pl. Vol. I (Q: "Do you recall identifying issues that raised the possibility that Martin — that caused Martin to have to consider changing the benefits in the plan? A: No, I do not. As a practical matter, the question was more could GE continue to administer and deliver the plan in our name. . . . I don't recall any issues that would have caused us to put the 'substantially similar' phrase in jeopardy."); McAllister Dep. at 50, Pl. Vol. I ("I have no knowledge of anything that was being changed. We were concerned about what we considered to be the generosity of some of the benefits, but that was not going to be addressed in that interim period.") Niznik Dep. at 49-50 (Q: "Are you aware of any alternatives that were under consideration during that time frame to maintaining the plan design as is through the end of 1993 for the pension plan for the transferred employees?" a: "Well, the answer to your question has to be no. That's what the contract called for, and there was no alternatives that I remember being discussed.")

Plaintiffs also point to internal documents containing references to Martin's provision of "the same" or "mirror" benefits. The various references are described in more detail in the fact section above, but in summary it appears that at least some of the GE and Martin players involved in the transition were operating under the assumption that the post-

sale 1993 benefits at Martin would, indeed, be the same as GE benefits. For instance, Martin's Roger McAllister took notes during a December 8, 1992 telephone conference, which read as follows:

> Issues from letter –
>
> – Savings plan – Answer Quick
>
> – Welfare plans – Mirror
>
> – Pension – same as now exist

Pl. D. Ex. 40. A letter from GE's Larry Cook dated December 9, 1992 states that "Bob McAllister, Manager — Compensation and Benefits Planning has confirmed Martin's intent to mirror all of the GE benefit plans and programs," and a summary apparently included with that letter entitled "1993 Post-Closing Employee Benefits Proposed Transition to New Plans" includes the language "MM will mirror GE benefits" under categories such as Payroll, Insurance Plans, and Pension Plans. Pl. D. Ex. 114. GE's Larry Cook and Martin consultant Rick Dunn also prepared a series of slides entitled "Payroll/Employee Benefits Transition Activities" for the December 15 meeting which indicate that "MM will mirror" GE benefits and/or plans for a number of programs, including insurance, pension, savings, flexible spending accounts, and others. Pl. D. Ex. 46. Further, on January 8, 1993 a Payroll and Benefits Transition project status report states that "MMC has agreed to provide pension and insurance benefits which are the same as GE's plans for the balance of 1993, except for the savings plan." Pl. D. Ex. 120.

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Defendants argue in response that the "mirror" language was regularly protested by Martin's representatives, and that no agreement to provide identical benefits had been reached. Further, Martin claims that it purposefully used terms such as "substantially similar" and "essentially equal" in order to provide assurance to transferring employees yet still reserving its flexibility should legal or other barriers preclude adopting identical plans. Martin also explains its failure to provide constant updates on the status of its decision-making process as an effort to avoid "piece-meal" disclosure. See Rodgers Dep. at 128-129 ("We [Martin] typically communicate benefits in total, but, you know, we don't communicate until we feel confident that the information is accurate and complete."); Kinstle Dep. at 178 (Martin wanted "to give the participants a single document they could look to for the broadly based array of benefits that they could expect."). As the GE Savings plan was built around the purchase of GE stock, and legally could not be offered to Martin employees, it thus had to be substantially revised, which Martin alleges accounts for part of the delay in announcing the entire benefits package.

While the dispute evidenced in the record regarding when Martin had agreed to provide identical benefits might, in another case, preclude a grant of summary judgment, this Court has already held that Martin was not a fiduciary of the Sub-class One plaintiffs at the time it made these representations. The outcome of both GE and Martin's motion, therefore, turns on the existence of any disputed material facts regarding GE's breach of its fiduciary obligations. GE advances the argument that it cannot be held liable for Martin's failure to make a timely decision about

the benefits it would provide, nor could GE have made any assurances or representations about the Martin benefits in the absence of any definitive pronouncement by Martin. In fact, GE claims, it repeatedly pressed Martin to announce its post-sale benefits, and the undisputed record bears out this claim. See Pl. D. Ex. 131; McAllister Dep. at 125, 126, GE Ex. No. 16 ("Obviously, the GE folks and their communication group thought we were dragging out feet. They thought I wasn't responding and nobody else was responding as quickly as they would like to."); Rodgers Dep. at 82, GE Ex. 20 ("What I recall is that GE pressed us on just about any topic. . . . GE wanted to get — let's do it, do it, boom.").

At heart, plaintiffs' claims against GE basically boil down to the contention that GE should have somehow compelled Martin to disclose its intended post-closing benefits earlier, or made the disclosure itself. From the Court's review of the lengthy and complicated record related to these motions, it is clear GE could do neither. First, aside from the contractually-agreed substantial similarity in benefits, GE had no control over the benefits that Martin would provide. As noted above, GE made several attempts to pressure Martin to release further information about the benefits it would offer, such as the faxed copy of the Philadelphia Inquirer article with the handwritten note by GE's Larry Cook. Pl. D. Ex. 131. But the fact remains that, despite its efforts, there was nothing GE could have done to compel Martin to commit to a particular benefits arrangement any earlier. Plaintiffs have submitted no evidence demonstrating that GE had some sort of authority or leverage to convince Martin to disclose its benefits, nor have they

presented any theories as to what steps GE could have taken that would have resulted in a more timely disclosure.

Secondly, had GE undertaken to independently communicate with its employees about Martin's benefits after the closing, it would have been doing so based on inadequate and, in some instances, incomplete information. For instance, the record demonstrates that McAllister, Martin's Manager of Compensation and Benefits Planning, initially indicated to GE's Cook that Martin would provide "mirror" plans, but that later Cook became aware that Martin had not made any such decisions, and that any understanding he had with McAllister "did not, in fact, reflect the actual decision process in Martin Marietta." Cook Dep. at 81, GE Reply App. Vol. II. Had GE nonetheless communicated that Martin would be providing identical benefits based on McAllister's telephone conversation with Cook, it would have been obliged to correct itself, thus engendering additional confusion and uncertainty regarding the transition process. Further, as pointed out by GE at oral argument, had GE promised its employees that Martin would provide identical benefits, it would have been incorrect, due to the changes in the savings plan, the product purchase plan, and other programs. GE may even have been subject to suit had it made such representations without an adequate basis in fact. See *Varity*, 516 U.S. at 498 (misrepresentations regarding future benefits of employees transferred to newly-formed subsidiary). Requiring GE to disclose at best tentative, if not inaccurate and incomplete, information would fly in the face of much of the law that has developed regarding benefits communications. See *Mullins v. Pfizer*, 23 F.3d 663, 669 (2d Cir. 1994) ("We do not require an

ERISA fiduciary to be perfectly prescient as to all future changes in employee benefits. Nor do we require a fiduciary to disclose its internal deliberations."); *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996) ("Too low a [disclosure] standard could result in an avalanche of notices and disclosures.").

In sum, plaintiffs have failed to demonstrate triable issues on the second and third elements of their claim. They have not demonstrated that GE had any material information, as it was unable to speak about the benefits Martin would be offering after the closing. Moreover, plaintiffs have not shown that GE could have done anything else to allay their concerns regarding Martin's future benefits, given GE's fiduciary obligations and its lack of control over Martin's decision-making process.

The Court recognizes that finding no fiduciary breach by GE leaves plaintiffs in somewhat of a Catch-22, as plaintiffs' knowing participation claim against Martin necessarily fails in the absence of any GE fiduciary breach in which Martin could be said to have knowingly participated, yet that prerequisite breach cannot be shown because only Martin had the authority to disclose post-closing benefits. Plaintiffs are caught between their potential future employer, who has no ERISA fiduciary obligation to provide the information they seek, and their current employer, who is without the ability to provide that same information.

While the potential for unfairness to plaintiffs of this outcome is apparent, several aspects of this case persuade the Court that such a result is consistent with ERISA's

statutory scheme and its purposes. First, the plain language of the statute itself compelled the Court's conclusion regarding Martin's fiduciary status. To the extent ERISA should be modified to reach the independent conduct of future employers or other third parties in the merger context, Congress is the appropriate entity to balance the competing interests at hand. Second, the Court is persuaded that requiring GE, an essentially blameless party on these facts, to defend its actions at trial simply to allow plaintiffs to reach the conduct of Martin would not further ERISA's purposes of encouraging the creation of private benefit plans by minimizing the costs to the employer. See *Weil v. Retirement Plan Administrative Committee of The Terson Co., Inc.*, 913 F.2d 1045, 1051 (2d Cir. 1990) (Weil II), vacated in part on rehearing, 933 F.2d 106 (2d Cir. 1991) (Weil III). Allowing trial to proceed would also have the counterintuitive effect of penalizing an employer that had sought to convey as much information as possible, even though it was prevented from providing full information by forces beyond its control.

Finally, any unfairness to plaintiffs is minimized by the unique facts of this case. The shadings between the information plaintiffs received — that benefits would be "substantially similar" — and the information they wanted — that benefits would be "identical" — are very fine indeed. While the Court is not willing to label the distinction immaterial as a matter of law, the fact remains that as of February 19, 1993, all GE employees knew that their pension, the central element of their benefits, would be calculated according to the identical formula at Martin as it had at GE. Pl. D. Ex. 71. The representative plaintiffs on Count III seek to minimize the impact of this fact by pointing to other benefit

programs that were of concern, such as family medical coverage, but GE and Martin disclosed that the majority of the remaining benefit programs would be identical on March 23, 1993. Therefore, the information that plaintiffs claim should have been disclosed was provided prior to the time any employment or retirement decisions had to be made by GE employees.

For the reasons outlined above, GE's motion for summary judgment on Count III of the complaint is GRANTED. As plaintiffs' claim against Martin necessarily fails as well, Martin's summary judgment motion on Count III is also GRANTED.

E. Partial Termination Claim Against Martin (Count II)

Plaintiffs' final claim alleges that the substantial layoffs at Martin after the GE and Lockheed mergers constituted a partial termination of the Martin "Trans Op Plan," and that under applicable regulations and the language of the plan participants were therefore entitled to a pro-rata allocation of the surplus assets. Defendant Martin attacks this claim on a number of grounds, arguing that a partial termination does not trigger allocation of surplus assets; that the count should be dismissed for a failure to exhaust; and that plaintiffs cannot prove that a partial termination occurred.[6] The Court will address the arguments in turn.[7]

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6. At oral argument, counsel for Martin advanced an argument positing that participants did not have standing to challenge a plan's asserted noncompliance with the Internal Revenue Code, as no private right of action existed. Aside from the fact that this argument

(Cont'd)

*Appendix B*

1. Allocation of surplus assets on partial plan termination.

As a general matter, ERISA requires that a retirement benefit plan, in order to qualify for favorable tax treatment, must provide that upon "partial termination" of such plan:

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(Cont'd)
was not briefed, in the second motion to dismiss Martin argued that due to the lack of a private cause of action, plaintiffs' claim must be brought under ERISA's civil enforcement scheme, and was thus subject to the exhaustion requirement. Martin renews this exhaustion argument on summary judgment. As it appears that the case has been litigated under the assumption that plaintiffs could challenge a failure to declare a partial termination under § 502(a)(3) to "redress [ ] violations" of ERISA or the terms of the plan, the Court will not re-examine plaintiffs' standing at this juncture.

7. In addition, in its brief Martin contended that plaintiffs do not have standing to pursue this claim. Defendant argues that since the only remedy on partial termination is immediate vesting, and all Subclass Two representatives are already 100% vested except for Donald Bloyer, whose termination was voluntary, no plaintiffs have standing to assert the partial termination claim. See *Sage v. Automation, Inc. Pension Plan Trust*, 845 F.2d 885, 891 (10th Cir. 1988) (Participants who were not terminated in connection with the significant corporate event that gave rise to the partial termination are not "affected" by such partial termination for standing purposes). The Court need not decide this issue, however, as plaintiffs moved to join three additional named plaintiffs who are members of Subclass Two and were not vested at the time their employment was terminated. The magistrate judge granted this motion, and plaintiffs' amended complaint was filed in October of 1999. Defendant's standing argument is therefore moot.

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> The rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable.

26 U.S.C. § 411(d)(3). The applicable Treasury regulations under this section state that "[a] plan is not a qualified plan . . . unless the plan provides for the allocation of any previously unallocated funds to the employees covered by the plan upon the termination or partial termination of the plan. . . ." 26 C.F.R. § 1.411(d)-2(a)(2)(i). The regulations go on to read as follows:

> Paragraphs (a)(2)(I) and (ii) of this section do not require the allocation of amounts to the account of any employee if such amounts are not required to be used to satisfy the liabilities with respect to employees and their beneficiaries under the plan.

26 C.F.R. § 1.411(d)-2(a)(2)(iii).

In accordance with these requirements, the relevant section of the Martin Plan provides that:

> XIV(2) PARTIAL TERMINATION
>
> In the event of partial termination of the Plan with respect to a specified group of participants, the Corporation shall cause the proportionate interest of such Participants in the Plan's Pension Fund to be determined by the Plan's Actuary and

> segregated by the Trustee to provide benefits to or on behalf of such Participants in accordance with the provisions of this Section XIV(3).

That section, in turn, reads:

> XIV(3) TERMINATION AND ALLOCATION OF PLAN PENSION FUND
>
> In the event of termination of the Plan, or partial termination of the Plan as defined in ERISA, each Participant's accrued benefit, determined in accordance with the provisions of the Plan and his participation to the date of such termination, shall become fully vested and nonforfeitable to the extent funded and shall be guaranteed by the Pension Benefit Guaranty Corporation. . . .

Martin Ex. JJ at 67-68. The Plan then goes on to list the order of preference for the payment of benefits from the portion segregated pursuant to section XIV(2), quoted above. Id. This schedule does not provide for the distribution or allocation of surplus assets, and only directs payment for certain categories of "benefits." Id. at 68.

Plaintiffs argue that the language of the Treasury regulations requires that all surplus assets be allocated to participants upon a partial termination. As a threshold issue, there is a logical inconsistency in plaintiffs' argument: a partial termination by the very nature of the term implies that at least some portion of the plan continues in existence,

but as the current plan is a defined benefit plan, the entire plan would have to terminate before the sponsor could calculate what portion of the plans' assets were actually surplusage after satisfying all the plans' benefit liabilities. See *Wilson v. Bluefield Supply Co.*, 819 F.2d 457, 464 (4th Cir.1987) (" 'Surplus' is the term used in the common law of trusts to describe any remaining assets in a trust after its purpose has been fulfilled.")

In addition, plaintiffs' argument is contradicted by the language of the statute and regulations themselves. As noted above, section 411(d)(3) protects "benefits accrued," and the Treasury regulations defining terms in § 411 provides that in the case of a defined benefit plan the term generally "refers only to pension or retirement benefits" and does "not include ancillary benefits not directly related to retirement benefits." 26 C.F.R. § 1.411(a)-7(a). See *Borst v. Chevron*, 36 F.3d 1308, 1315 (5th Cir. 1994) (concluding that, based on definition in Treasury regulations, "benefits accrued" in § 411(d)(3) does not encompass a right to a share of the surplus assets if not specified in the plan itself), cert. denied, 514 U.S. 1066, 131 L. Ed. 2d 561, 115 S. Ct. 1699 (1995). The regulations also suggest this conclusion by carefully noting what § 1.411(d)-2(a)(2)(i) do not require: allocating amounts to the accounts of participants that are in excess of the amount necessary to satisfy the plan's liabilities to those employees.[8] The language of these regulations suggests that any claim to surplus assets is not a "right[ ] . . . to benefits accrued" under the Plan.

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8. Whether outstanding surplus assets may be considered a liability of the plan is considered infra at 80.

Further, plaintiffs have cited to no cases where courts have concluded that a partial termination required an allocation of surplus assets to plan participants in defined benefit plans, and in fact most relevant case law, including recent Supreme Court pronouncements, supports the opposite result. As concluded in the Court's September, 1996 ruling on defendants' motions to dismiss, "a defined benefit plan gives current and former employees property interests in their pension benefits, but not in the assets held by the trust." Ruling on Motion to Dismiss (Doc. # 144), citing *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994). More recently, the Supreme Court also held that participants in a defined benefit plan "have no entitlement to share in a plan's surplus. . . ." *Hughes Aircraft*, 119 S. Ct. at 761. Even prior to the Supreme Court's pronouncement, every circuit court that considered the issue has reached the same conclusion. See *Malia v. General Elec. Co.*, 23 F.3d 828 (3rd Cir. 1994), cert. denied, 513 U.S. 956, 130 L. Ed. 2d 328, 115 S. Ct. 377 (1994); *Brillinger*, 130 F.3d at 62. Such principles would seem fully applicable to the case of a partial termination.

In *Bennett v. Conrail Matched Savings Plan Admin. Committee*, 168 F.3d 671 (3rd Cir. 1999), cert. denied, 145 L. Ed. 2d 146, 120 S. Ct. 173 (1999), the Third Circuit held that in the case of the partial termination of a defined contribution plan, participants were not entitled to share in the surplus assets. The court explained its reasoning based on a distinction set out in Third Circuit case law: "as we determined in Malia, accrued benefits are liabilities of a plan; assets (such as surplus) fall on the other side, the asset side, of the balance sheet." Id. at 676. The accumulated surplus assets of a plan were thus not properly considered

"outstanding liabilities" of the plan under the Treasury regulations quoted above, and the court upheld the dismissal of plaintiffs' complaint. Id. Similarly, the Fifth Circuit in Borst cited Malia in support of its conclusion that plaintiffs had no statutory entitlement under § 411(d)(3) to a pro rata share of residual or surplus assets on partial termination of a defined benefit plan. 36 F.3d at 1317.

The conclusion that § 411(d)(3) and its implementing regulations require only that all participants become fully vested upon partial termination of a plan is further supported by the outcome in *Weil III*, 933 F.2d at 106. A group of terminated employees brought suit arguing that a partial termination had occurred at the Terson companies, entitling them to certain vested benefits. In the third trip to the Second Circuit in Weil III, the court vacated that part of its previous decision in Weil II which limited the measure of partial plan terminations to nonvested participants. The court still noted legislative history that referred to § 411(d)(3) as "the rule of full immediate vesting," but concluded that the legislative intent behind that section was ambiguous, because "it is equally arguable that in enacting this section, Congress mainly intended to prevent employers from abusing pension plans to reap tax benefits." Id. at 108, 109. The court then determined that the IRS rule, which counted both vested and nonvested participants when determining the appropriate ration at which partial terminations occurred, was a permissible construction of the statute. Inasmuch as the district judge had so ruled in his original opinion, vacated by Weil II, the circuit court reinstated that order "that defendants purchase annuities sufficient to provide benefits to plaintiffs equivalent to the actuarial present value of their

benefits," in addition to attorney's fees and costs. Id. at 1110. No provision for excess or surplus assets was made.

At oral argument, counsel for plaintiffs attempted to avoid the ineluctable force of this authority by arguing that plaintiffs sought only an allocation of the surplus assets, rather than a distribution. This semantic distinction, however, does not dictate a different result. First, the applicable regulations quoted above use the terminology "allocate," expressly noting what the regulations do not require: an "allocation of amounts to the account of any employee if such amounts are not required to be used to satisfy the liabilities with respect to employees and their beneficiaries under the plan." 26 C.F.R. § 1.411(d)-2(a)(2)(iii). Second, the cases finding against plaintiffs' position in this matter often use the terminology employed by plaintiff, to the opposite effect. See e.g., *Rummel v. Consolidated Freightways*, 1992 U.S. Dist. LEXIS 15144, 1992 WL 486913 (N.D.Cal.) (Granting motion to dismiss partial termination claim because "plaintiffs have not identified a single court decision or agency ruling holding that the unacccrued assets . . . must be immediately allocated upon a partial termination.") (emphasis added). An allocation or a distribution would have the same effect, albeit at different junctures: giving participants a claim of right to surplus assets. Such a claim is not supported by the case law or the statute and its implementing regulations, and thus plaintiffs' parsing of the phraseology of their claim does not cure its flaws.

As the statute and applicable regulations do not provide a basis for plaintiffs' claims to an allocation of excess assets,

they must seek support in the language of the Plan itself. Yet their arguments based on an interpretation of the Martin Trans Ops Plan are to no avail. The plan provides, in accordance with ERISA, that "each Participant's accrued benefit . . . shall become fully vested and nonforfeitable" in the event of a partial termination. Martin Ex. JJ at 68. The plan also orders the priority of payments from the plan pension fund in the case of a full or partial termination, but does not direct the allocation of any surplus. Instead, the plan only orders the payment of various categories of benefits. The final category in this list on which plaintiffs rely provides that the Plan's funds shall be used to pay or provide for "the benefit with respect to Participants vested in accordance with the provisions of this Section . . . and not heretofore provided for in this Section. . . . ," i.e., those plaintiffs vested upon partial termination. Id.

The Court declines the plaintiffs' invitation to interpret the language of this "catch-all" provision to require an allocation of all the surplus assets. The final section, like the other five categories before it, speaks only in terms of benefits, not residual or excess assets. As noted by the Third Circuit in Malia:

> 'Benefits' are elements that are conceptualized and treated differently in a plan termination than are 'assets' of that plan. 'Benefits' are computed in a different manner than 'assets.' Accrued benefits are placed on the liability side, rather than on the asset side of the balance sheet.

23 F.3d at 832. In addition, the Martin Plan contains a clause allowing reversion of plan assets "after provision for all

benefits and expenses in accordance with the foregoing." Martin Ex. JJ at 69.[9] Under the normal rules of contract interpretation, this provision would be rendered superfluous if one read the "catch-all" section to require the distribution of all excess assets.[10]

In *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D.Tex. 1991) the court cited this section as support for its holding that ERISA did not require distribution of surplus assets upon partial plan termination. "Allowing an employer to recover surplus assets if these conditions are met is consistent with the policies underlying ERISA. Employers

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9. While no assets transferred from the GE Pension Plan could ever revert to Martin under the terms of the Transaction Agreement, plaintiffs have not claimed that the alleged partial termination worked a reversion of any portion of those assets.

10. ERISA also allows a reversion of excess assets to the employer. Section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1), outlines the circumstances under which employers may recapture surplus assets:

> Any residual assets of a single-employer plan may be distributed to the employer if —
>
> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
>
> (b) the distribution does not contravene any provision of law, and
>
> (C) the plan provides for such a distribution in these circumstances.

will continue to fund their plans under ERISA guidelines, but will not be penalized for overfunding in 'an abundance of caution' or as a result of a miscalculation on the part of an actuary." Id. at 1184 (internal citations omitted).

In conclusion, neither the Plan language nor ERISA and its implementing regulations requires an allocation of surplus assets as a remedy for partial plan termination. Therefore, even assuming that there was a partial termination due to the substantial layoffs, plaintiffs would only be entitled to a vesting of their accrued benefits, under the applicable Treasury Regulations and the language of the Plan.

2. Exhaustion Requirement

The Court's conclusion that neither the terms of ERISA nor the Plan require distribution or allocation of surplus assets upon partial plan termination does not dispose of Count II in its entirety, because those plaintiffs who were nonvested participants in the Martin Plan still would be entitled to full and immediate vesting in the case of a partial termination. Thus, the Court must consider whether these nonvested participants have presented sufficient evidence to warrant a trial on their partial termination claim. Defendant contends that no trial is required, because plaintiffs failed to pursue their internal plan remedies before bringing suit in federal court.

This Court's second ruling on the motion to dismiss cited *Kennedy v. Empire Blue Cross & Blue Shield* for the "firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases." 989 F.2d 588

(2d Cir. 1993) See Ruling on Motion to Dismiss (Doc. # 160) at 10. The Court did not consider the exhaustion issue as grounds for dismissal, however, as the "procedural posture of Kennedy suggests that while a showing of exhaustion or futility is needed, it is not a technical pleadings requirement, but implicates fact-dependent issues." Ruling on Motion to Dismiss (Doc. # 160) at 12, citing *Kennedy*, 989 F.2d 588, 592 (court converted motion to dismiss on exhaustion grounds to motion for summary judgment in order to consider material external to the complaint). Martin now urges the Court to grant summary judgment on this issue, as plaintiffs failed to exhaust their administrative remedies. Plaintiffs counter that exhaustion is not required in the context of partial plan terminations, and that any such attempt would have been futile.

Plaintiffs point to no case where exhaustion was explicitly excused in an ERISA case based on a partial termination claim. Rather, these cases often arise after a plan administrator or committee has determined that no partial plan termination occurred. See, e.g., *Weil II*, 913 F.2d at 1047 (Administrative committee of retirement plan determined that partial termination had not occurred, following which plaintiffs brought suit); *Kreis v. Charles O. Townley, M.D. & Assoc.*, 833 F.2d 74 (6th Cir. 1987) (after Plan Administrator decided that partial termination had not occurred and denied plaintiffs' claims for accrued unvested benefits, plaintiffs brought suit in federal court); *Admin. C'tee of The Sea Ray Employees' Stock Ownership And Profit Sharing Plan v. Robinson*, 164 F.3d 981 (6th Cir. 1998) (litigation followed determination by Plan Administrative Committee that no partial termination had occurred).

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Plaintiffs argue that under the particular circumstances of this case, the Court should not require resort to the remedies under the Plan. In particular, plaintiffs argue that exhaustion is not appropriate because questions of law are involved, not the interpretation and application of specific plan-based benefits rules. In cases involving claims for benefits under the terms of the plan, the argument continues, the experience and expertise of the plan officials and the goal of consistent decision-making under the plan may call for deference to fact-finding by plan administrators, but the purpose of the exhaustion requirement is not pertinent to the nature of this claim, which involves employment events external and unrelated to the plan. See Pl. Mem. in Opp. at 28.

This Court excused the exhaustion requirement in *MacKay v. Rayonier, et al.*, 25 F. Supp. 2d 47 (D.Conn. 1998), in which it concluded that it made "little sense" to apply the exhaustion requirement to counter-claim plaintiff's § 510 retaliation claim, as it would require claimants to utilize the internal review procedures of the entities which allegedly discriminated against him. "This logic is particularly appealing since no plan administrator's decision on any particular plan term is implicated by the employer's overall alleged motivation to deprive the discharged employee of benefits to which he or she may otherwise become entitled." *MacKay*, 25 F. Supp. 2d at 50. In contrast, the plan at issue in the instant case does include a provision governing partial termination, and the subjective motivation of the employer is irrelevant to the individual cases. Rather, the sole issue for the administrator to decide would have been whether the requisite number of terminations had occurred, and plan officials may have had more familiarity with and access to

the appropriate data to make that determination. Thus, this Court's decision in MacKay is distinguishable.

The Court has been able to locate only two cases addressing the issue, with one coming down on each side of the question. When faced with a claim that alleged a partial termination of the pension plan, the Northern District of Illinois ordered plaintiffs to exhaust their internal remedies prior to bringing suit. *Schultz v. The Quaker Oats Co.*, 1999 U.S. Dist. LEXIS 1615, 1999 WL 90629 (N.D. Ill.). The court reasoned that requiring exhaustion in these circumstances served the purposes of the exhaustion requirement, identified by the Seventh Circuit, of minimizing frivolous lawsuits, promoting nonadversarial dispute resolution, decreasing the cost and time of claim settlement, and promoting Congress' intent that trustees have the primary responsibility for claims processing. Id. at *4. However, the district court also relied on a Seventh Circuit decision requiring that § 510 claims be presented to the plan administrator prior to the initiation of a federal suit, an outcome this Court rejected in MacKay. See 25 F. Supp. 2d at 50, citing Lanford (disagreeing with reasoning of Seventh Circuit in *Kross v. Western Elec. Co.*, 701 F.2d 1238 (7th Cir. 1983)). The District of Alaska, in contrast, has held that participants need not exhaust administrative remedies to pursue a partial termination claim, but premised that conclusion on its reading of the language of the Plan. *Thayer v. Alaska Teamster-Employer Pension Trust*, 1993 U.S. Dist. LEXIS 19553, 1993 WL 173710 (D.Alaska) ("From my review of the Trust Agreement . . . I conclude that there were no procedural provisions for the type of review envisioned by 29 U.S.C. § 1132, and that therefore plaintiffs had no

internal remedies to exhaust.") Both of these cases are short on analysis, however, and the merits of their competing views cannot be adequately assessed.

In this Court's view, partial termination claims such as the one asserted by plaintiffs should properly be presented to the plan administrator in the first instance. There is no internal inconsistency in such a requirement as may be present in § 510 claims, because there is no presumed hostility on the part of the plan administrator to participants and beneficiaries claiming a partial termination; to the contrary, in the partial termination context the number of affected employees is necessarily large, thus negating any inference of individual animus. Several of the purposes of the exhaustion requirement in ERISA cases will also be served by extending it to partial termination claims, in that it will "uphold Congress' desire that ERISA trustees be responsible for their actions, not the federal courts," and "provide a sufficiently clear record of administrative action if litigation should ensue." *Kennedy*, 989 F.2d at 594. This case could be seen as an object lesson on the importance of this latter purpose, given the disputes and confusion regarding which termination codes should be considered employer-initiated terminations for purposes of calculating the relevant percentage. Had plaintiffs pursued their claims administratively before bringing a federal suit, the plan trustees and administrators would have been able to gather documentation and conduct statistical analyses on this issue, rather than presenting a federal court with reams of confusing and sometimes internally inconsistent data. See e.g., Pl. Ex. 3 (Greenstein Report, with Accompanying Data).

Further, as the Court has determined that the only remedy in the context of a partial termination is immediate vesting for all participants, requiring exhaustion would not put plan administrators and trustees in the untenable position of determining the disposition of potentially millions in surplus assets; rather, they would simply decide whether the requisite number of terminations had been reached, and if so, deem claimants fully vested. Determinations of vesting and eligibility are normally within the province of the plan administrator, and plaintiffs have pointed to no internal conflicts or difficult legal questions that would arise from giving plan administrators the first pass at the question.

The Court also does not believe imposing an exhaustion requirement in this context would be unduly burdensome to potential claimants. While filing of their federal claims may be delayed by at most 6 months, Martin Ex. JJ at 62, success at the administrative level would provide benefits in a more timely fashion and at reduced cost than would full-blown litigation. To the extent a plan administrator or trustee bears some animus or unfairly skews the determination process, any administrative decision regarding plan terminations would be subject to de novo review by this court. See *Weil II*, 913 F.2d at 1049 ("We agree that the determination by plan administrators as to whether a partial termination has occurred is not subject to deference, and, accordingly, we conclude that the district court properly reviewed the Committee's denial of benefits to plaintiffs under a de novo standard of review."), vacated on other grounds, 933 F.2d 106 (2d Cir. 1991). This does not weigh in favor of excusing a first-level administrative decision, as plaintiffs would have it; rather, it operates as insurance that, should the administrative

process fail claimants in some way, a federal court will be able to intervene and provide participants with a remedy.

Plaintiffs seek to invoke an exception to the exhaustion requirement by asserting that proceeding administratively would have been futile in this case. Determining the applicability of the futility exception involves reviewing the terms of the plan as well as the actions of the various parties. As this Court has previously observed, exhaustion in the context of ERISA requires only those administrative appeals provided for in the relevant plan or policy. *MacKay*, 25 F. Supp. 2d at 50, citing *Kennedy*, 989 F.2d at 592. According to the terms of the Martin Plan, a participant may "request a review of his claim upon written application to the Vice President, Benefit Finance and Administration. . . ." Martin Ex. JJ at 62. This vice president is to conduct a "full and fair review of a denial of a claim" and shall "render a decision as promptly as possible, but no later than 120 days after receipt of a request for review." Id. This decision "on matters of denial of claims shall be final and binding on all parties for the purpose of review under the provisions of this Plan." 25 F. Supp. 2d at 63.

Plaintiffs view this review procedure as inadequate to address their claims, because: 1) the plan has no previous experience in assessing questions of partial termination; 2) the plan has no appeal procedure specifically applicable to these issues; and 3) the plan itself did not have access to the correct data about the employment terminations until March 1999. Pl. Mem. in Opp. at 29. Plaintiffs have not further explained this last contention, nor have they cited to any portion of the record in support. The Court does not find,

in any event, that it provides grounds for the application of the futility doctrine, as it does not speak to what information the Plan could have accessed had such a claim been filed.

The lack of previous experience in assessing partial termination claims and the absence of any specific plan provision for addressing them do not constitute adequate justification for failing to exhaust. As an initial matter, the Plan cannot gain experience or expertise in these sorts of cases if claims are not brought to the plan in the first instance. Further, the case law interpreting the futility exception demonstrates that the unusual or unprecedented nature of a claim is not grounds for excluding it altogether from the administrative regime. "Usually, the futility exception is applied in a context in which there has been, in some form, an unambiguous application for benefits and a formal or informal administrative decision denying benefits and it is clear that seeking further administrative review of the decision would be futile." *Barnett v. IBM*, 885 F. Supp. 581, 588 (S.D.N.Y. 1995). The Southern District also canvassed the applicable case law on the futility exception in *Ludwig v. NYNEX*, 838 F. Supp. 769, 781 (S.D.N.Y. 1993). The court observed that federal courts have invoked the futility doctrine in the following circumstances: 1) where the claimant brings a claim under § 510 of ERISA; 2) where, for summary judgment purposes, there is a material issue of fact as to whether the claimant has "properly appealed" a denial of benefits through the specified administrative channels; 3) where the plan has failed to respond to the claimant's, or the claimant's representative's, written request for a review of the plan's benefit eligibility determination; 4) where there is a material issue of fact as to whether the plaintiff was

informed of the appeals process; or 5) where the plan fiduciary has acted in bad faith, in breach of its fiduciary duties. Id. (citing cases). Such is not the case on these facts.

The nature of the futility exception renders it inapplicable to partial termination claims, and the Court is not persuaded by plaintiffs' arguments to the contrary. As the Court has decided that the exhaustion requirement applies to the claims of nonvested participants, and that plaintiffs are not excused on the grounds of futility, summary judgment will enter on Count Two of Plaintiffs' Complaint. The nonvested plaintiffs in Count Two are required to first present their claims to the Vice-President of Benefit and Finance, as provided for under the terms of the Plan, before seeking federal review of their partial termination claim. As the Court has determined that the only remedy in case of a partial termination is full vesting, not allocation of surplus assets, and that exhaustion is required, it need not reach defendant's final argument that the percentage reductions disclosed here are insufficient to create a partial termination as a matter of law.

## IV. CONCLUSION

For the reasons stated above, GE's Motion for Summary Judgment as to all GE Defendants (Doc. # 208) and defendant Martin Marietta's Motion for Summary Judgment (Doc. # 204) are GRANTED. The clerk is directed to close the case.

IT IS SO ORDERED.

s/ Janet Bond Arterton
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 29th day of March, 2000.

## APPENDIX C — RULING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT ON DEFENDANTS' MOTIONS TO DISMISS DATED, DECIDED AND FILED SEPTEMBER 30, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

NO. 3:93cv516 (JBA)

WILLIAM G. FLANIGAN, ET AL.,

v.

GENERAL ELECTRIC CO., ET AL.

September 30, 1997, Decided
September 30, 1997, Filed

* * *

RULING ON DEFENDANTS' MOTIONS TO DISMISS
[DOCS. 146 and 148]

Janet Bond Arterton, United States District Judge.

On September 26, 1996, the court granted the plaintiffs leave to file an amended complaint to bring the factual allegations of the complaint up-to-date, particularly with respect to defendant Lockheed Martin ("Martin"); and denied Martin's motion to dismiss without prejudice to renew after plaintiffs filed their amended complaint. Following submission

of the amended complaint, GE defendants and defendant Martin filed the present motions to dismiss.

## BACKGROUND

The First Amended Complaint provides a lengthy set of allegations pertaining to events both before and after the sale of GE Aerospace ("GE") to Martin Marietta (now known as Lockheed Martin). On November 23, 1992, GE and Martin announced that they had reached a definitive agreement with respect to the sale of GE's aerospace division. The Transaction Agreement provided that all aerospace employees as of the closing date of the sale would be transferred to Martin, and would be provided with employee benefit plans that were "substantially similar" to those provided by GE. Retirement benefits would include a defined benefit pension plan, hereinafter referred to as the Successor Plan.

Much of the Amended Complaint details the representations made by GE and Martin to employees concerning the Successor Plan between the announcement of the sale and the closing date. Plaintiffs allege that "these representations were vague and incomplete and failed to provide employees with information they needed to know to determine whether to accept transfer to employment by Martin." Amended Complaint, P 48.

The Amended Complaint also details various provisions of the GE Plan in effect at the time of the closing, particularly those pertaining to the Special Early Retirement Option (SERO) and Plant Closing Pension Option (PCPO). The GE Benefits Handbook provides that SERO

allows certain employees to retire as early as age 55 with an unreduced pension when they lose their jobs because of certain Company actions. You are eligible for SERO if you:

> Are at the ages of 55 through 59 and have at least 25 years of Pension Qualification Service and
>
> Lose your job because of a layoff, plant closing, work transfer, automation, discontinuation of a product line or a reduction in force of an indefinite duration.

If you are eligible for SERO pension, you must retire by the first day of the month following the loss of your job. July 1, 1994 is the last day an eligible employee can retire with a SERO pension.

Amended Complaint, P 73.

The Handbook provides that PCPO "allows certain employees to receive pension benefits as early as age 50 when they lose their jobs because the Company closes the plant, service shop or other facility where they work." Amended Complaint, P 74. As with SERO, the Handbook limits eligibility to employees who retire prior to July 1, 1994. However, the complaint alleges that, notwithstanding the nominal expiration date of the PCPO and SERO programs, "in practice at GE, these benefits have routinely been renewed over the years and have never been withdrawn.

Indeed, after employees were transferred to Martin, in July 1994 the SERO and PCPO benefits of the GE Plan were once again renewed to July 1, 1997 . . . ." Amended Complaint, P 75.

Plaintiffs further allege, "A substantial number of transferred GE Aerospace employees, including [several named plaintiffs], have lost their jobs with Martin Marietta as a result of the consolidation of operations between GE Aerospace and Martin and accompanying workforce reductions." Amended Complaint, P 83. However, effective for retirements occurring after January 1, 1995, Martin Marietta eliminated the SERO and PCPO benefits. Thus, "all Transferred Employees who have been laid-off or terminated from employment with Martin Marietta/Lockheed Martin since late 1994, including [various named] plaintiffs . . . will be deprived of accrued early retirement SERO and PCPO pension benefits to which they were entitled." Amended Complaint, P 85.

## LEGAL STANDARD

"In reviewing a complaint for dismissal under Rule 12(b)(6), the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in plaintiff's favor. The complaint may be dismissed only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2nd Cir.) (citations omitted), cert. denied, 513 U.S. 836, 115 S. Ct. 117, 130 L. Ed. 2d 63 (1994). In deciding a motion to dismiss for failure to state a claim, "the issue is not whether

the Plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support claims. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); See *Weisman v. LeLandais*, 532 F.2d 308, 311 (2nd Cir. 1976) (per curiam).

## DISCUSSION

### Count I: Failure to Provide Clear and Complete Information to Plan Participants

In Count I, plaintiffs claim,

> Defendants GE and Lockheed Martin acted jointly to prepare and provide to plaintiffs and the class, as affected employees, statements about the benefits they would receive under Martin's successor pension plan after the closing. . . .
>
> Defendants failed to provide complete and accurate information about the benefits that Martin would provide to Transferred Employees. This violation of fiduciary duties was most prejudicial to those GE employees, including plaintiff Marvin Sedlacek, who were eligible to take early retirement before the Closing Date and who elected to do so out of justifiable fear that valuable pension rights would be denied or made less secure if they were transferred to the payroll of Martin Marietta and lost their participant status in the GE Plan.

*Appendix C*

> Other members of the class, including plaintiffs Pape, Gilbert, and McGuire, were not eligible to take retirement at the time of closing of the sale. These employees instead elected to resign or obtain a "Job Elimination Program" termination from the employ of GE solely to preserve their participant status in the GE Plan and the security associated with the Plan.
>
> These retirements and resignations were induced by defendants' violations of their obligations to provide complete and accurate information about the benefits that Transferred Employees would receive.

Amended Complaint, P 88-91.

GE defendants and Martin argue that Count I fails to state a cause of action because plaintiffs have nowhere claimed that GE or Martin gave false or misleading information in response to a direct inquiry concerning intended changes in benefits. Rather, GE defendants style Count I as "the failure to prognosticate cause of action." Defendants rely on *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996), in which the Second Circuit held that "a fiduciary is not required to voluntarily disclose changes in a benefit plan before they are adopted." While plan fiduciaries may have a "duty not to make affirmative misrepresentations or omissions," fiduciaries do "not have a duty to disclose proposed changes in the absence of inquiry" by a plan beneficiary; thus, a fiduciary only comes "under a duty to voluntarily disclose once it [has] adopted the plan changes."

Id. at 279. Martin and GE defendants argue that because they were under no duty to "voluntarily disclose" anything about its plan before the plan was adopted, plaintiffs have no cause of action with respect to the pre-adoption disclosures absent allegations of affirmative misrepresentations.

Plaintiffs, however, contend that their allegations are quite different from those found to be wanting in Pocchia. The Amended Complaint does not allege that the defendants simply failed to make voluntary disclosures (or "failed to prognosticate"). Rather, generously construing plaintiffs' allegations in the most favorable light, the complaint alleges that GE employees made repeated inquiries about the benefits they would receive under the Successor Plan, Amended Complaint, PP 59-61; defendants promised that Martin would "fully inform" employees about pension benefits prior to the closing, such that each employee would be able to make a "well-informed decision" about retirement, and that there would be "ample time" to make such decisions, Amended Complaint, PP 54-55, 57, 60, 63; defendants' repeated assurances that the Successor Plan would provide benefits "substantially similar" to the GE Plan were inadequate to permit informed decision-making, Amended Complaint, P 60; defendants provided adequate information about the Successor Plan no earlier than March 23, 1993, if even then, Amended Complaint, P 65; and the disclosures of March 23, as well as the subsequent establishment of a 56-day window period, were too late to provide the promised "ample time" for "well-informed" decisions. Amended Complaint, PP 65-66.

The case at this juncture may as well be analogous to *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997),

in which the Second Circuit held that the defendant's failure to disclose a contemplated early retirement incentive program could be actionable in light of the defendant's assurances to employees that no such program would be adopted. The Second Circuit explained that defendant Eastman Kodak need not have seriously contemplated the change, merely that they did not rule it out completely.

According to the allegations in the present case, defendants represented that they would provide employees with ample time and information so that plaintiffs could make informed decisions as to their job futures, and then failed to do so. Ballone suggests employer misrepresentations may constitute a breach of fiduciary duty even when the representations pertain to the employer's future actions. See id. at 126 ("While it is correct . . . that [the defendant] need not be prescient, an employer does not enjoy carte blanche to make statements that the employer knows to be false, or that have no reasonable basis in fact, simply because the statements concern the future."). The difference between this case and Ballone is that in Ballone the plaintiffs' cause of action arose from untrue assurances on which the plaintiffs had detrimentally relied. In this case, the plaintiffs challenge the defendants' failure to live up to the initial assurance. However, mere failure to give more information will be unavailing in the absence of evidence that defendant, in fact, had more information that was material to making decisions about the successor plan, and that was withheld. The plaintiffs must ultimately be able to show after discovery 1) that they were promised certain material information, 2) that the defendants had that material information, and 3) that the defendants misled the plaintiffs as to what that

information was or affirmatively withheld the information. Accordingly, the court concludes that the plaintiffs' claim is at least minimally pleaded to survive a motion to dismiss insofar as they allege that the defendants' assurances that ample time and information would be available had "no reasonable basis in fact".

Martin further argues that, as a matter of law, it had no fiduciary duty to the GE employees until the Successor Plan was adopted. However, the court rejected this argument after consideration of the motions to dismiss the original complaint. Martin does not identify any differences in the allegations of the Amended Complaint that would render a determination of fiduciary status on the face of the pleadings any more appropriate, particularly in light of P21 of the Amended Complaint, which attributes to Martin certain legal control status with regard to the GE-Martin transfer agreement. Indeed, plaintiffs' more detailed allegations concerning Martin's role in promulgating various pre-closing communications to employees may lend additional support to the court's earlier conclusion.[1] Amended Complaint, PP 50, 55, 58, 61-63, 65.

Thus, defendants' Motion to Dismiss Count One is DENIED.

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1. Even in the absence of a fiduciary relationship, a party may be liable for knowingly participating in an ERISA fiduciary's breach of duty. See *Diduck v. Kaszycki*, 974 F.2d 270 (2d Cir. 1992); *Lowen v. Tower Asset*, 829 F.2d 1209 (2d Cir. 1987); *Donovan v. Daugherty*, 550 F. Supp. 390, 411 (S.D. Ala. 1982).

*Appendix C*

## Count II: Failure to Allocate Surplus Assets and Vest Benefits Upon Partial Termination of the Successor Plan

Under § 411(d)(3) of the Internal Revenue Code, certain plans must provide that upon "partial termination . . . the rights of all affected employees to benefits accrued to the date of such . . . partial termination . . . to the extent funded as of such date . . . are nonforfeitable." Although "partial termination" is not defined under ERISA, the House and Senate reports state that "examples of a partial termination might include, under certain circumstances, a large reduction in the workforce, or a sizeable reduction in benefits under the plan." H.R. Rep. No. 807, 93rd Cong., 2d Sess., quoted in *Weil v. Retirement Plan Administrative Comm.*, 933 F.2d 106, 109 (2d Cir. 1991). Treasury regulations define partial termination for tax purposes as follows:

> General Rule. Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

26 C.F.R. § 1.411(d)-2(b)(1). The partial termination rule is triggered in these circumstances "to prevent forfeiture of pension benefits that have not yet vested and to prevent a

windfall to the employer through a reversion of money on which the employer has paid no federal income taxes." *In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1165 (S.D. Tex. 1991).

Plaintiffs allege that a partial plan termination has occurred with respect to the Successor Plan through substantial layoffs which is sufficient to allow plaintiffs to proceed on the claim of partial termination under the General Rule definition:

> Following the Sale, a significant number and significant percentage of participants in the [Plan] have been discharged from their jobs and ceased to be active participants, in part as a result of major corporate events involving plant closings and consolidation and restructuring of operations between GE Aerospace and Martin Marietta, and then between Martin Marietta and Lockheed. In addition, Lockheed Martin has changed the [Plan] to reduce participants' future accruals of benefits and to eliminate accrued benefits.

Amended Complaint, P 94.

Plaintiffs additionally claim that "Lockheed Martin has changed the Trans Ops Plan to reduce participants' future accruals of benefits and to eliminate accrued benefits," and that this also constitutes a partial plan termination.[2] Amended

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2. The treasury regulations further provide that the following situations constitute partial terminations:

(Cont'd)

Complaint, P94. Because the complaint does not identify any other plan benefit changes, the court presumes that the alleged reduction and elimination of benefits above refers to the elimination of the SERO and PCPO benefits after 1994. Defendant Martin contends that this elimination of the SERO and PCPO benefits cannot constitute a reduction or decrease in benefits, because the plans expired by their own terms effective January 1, 1995. Alternatively, defendant Martin claims that this allegation is one of a "horizontal termination," and that these so-called horizontal terminations have no support in the case law. Because the court agrees with defendant Martin that the elimination of the SERO and PCPO benefits cannot constitute a plan benefit reduction of accrued benefits, as discussed under Count IV infra, the court need not reach the second issue of whether "horizontal terminations" are actionable.

Defendants contend that, because the partial termination language appears only in the Internal Revenue Code, a plan participant has no standing to bring a civil action asserting

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(Cont'd)

> Special Rule. If a defined benefit plan ceases or decreases future benefit accruals under the plan, a partial termination shall be deemed to occur if, as a result of such cessation or decrease, a potential reversion to the employer, or employers, maintaining the plan (determined as of the date such cessation or decrease is adopted) is created or increases. If no such reversion is created or increased, a partial termination shall be deemed not to occur by reason of such cessation or decrease.

26 C.F.R. § 1.411(d)-2(b)(2).

its violation. Rather, in lieu of bringing an action to enforce the Code's plan qualification requirements directly, plaintiffs must sue under ERISA's civil enforcement scheme based on the terms of the employee benefit plan. If this is the case, defendants argue, then plaintiffs must exhaust the plan's ERISA-mandated internal review process first. Martin contends that plaintiffs have failed to do so, and therefore are barred from bringing this claim.[3] Plaintiffs dispute that their claims brought pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a)(3), are subject to an exhaustion requirement. Alternatively, plaintiffs argue that even if exhaustion is required, it should be excused in this case because it would be futile.

The Second Circuit "has recognized 'the firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases.'" *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588 (2nd Cir. 1993) (quoting *Alfarone v. Bernie Wolff Construction*, 788 F.2d 76, 79 (2nd Cir. 1986)). As the court in *Denton v. First Nat'l Bank of Waco, Texas*, 765 F.2d 1295 (5th Cir. 1985), explains,

> The primary purposes of the exhaustion requirement are to (1) uphold Congress' desire

---

3. Defendants also argue that plaintiffs lack standing to bring this claim because the Amended Complaint "does not identify a single named Plaintiff who did not have vested status under the Trans Ops plan at the time he or she was allegedly affected by the alleged partial plan termination." Defendant's Mem. at 29. Plaintiffs clarify in their response that "it is expressly alleged that named plaintiff Donald Bloyer is not vested in his normal pension benefits." Plaintiff's Mem. in Opp. at 22-23.

> that ERISA trustees be responsible for their actions, not the federal courts; (2) provide a sufficiently clear record of administrative action if litigation should ensue; and (3) assure that any judicial review is made under the arbitrary and capricious standard, not de novo.

Id. at 1300.

In support of their argument that exhaustion is not required, plaintiffs argue in their briefing, but not the complaint, that "the question of whether a partial termination has occurred involved questions of law, and a determination on this issue by the administrators of the Martin plan would not be subject to any deference by the Court." Plaintiffs' Mem. in Opp. at 8. Plaintiffs also argue that exhaustion should not be required in this case because the claim at issue does not merely raise a narrow, technical question, but rather requires resolution of complex legal and factual matters that lie beyond the experience and expertise of the Plan administrator.

"Where claimants make a 'clear and positive showing' that pursuing available administrative remedies would be futile, the purposes behind the requirement of exhaustion are no longer served, and thus a court will release the claimant from the requirement." *Kennedy*, 989 F.2d at 594. Plaintiffs maintain that futility in this case is established by the fact that Martin has no administrative procedure by which to review a claim of this nature and by the positions Martin has taken in this litigation, i.e., that no partial termination has occurred, plaintiffs have no entitlement to surplus assets,

and plaintiffs have no accrued benefits from the SERO and PCPO programs. Martin disputes that it lacks an administrative procedure to handle claims of this nature or that it has developed a definitive position on plaintiffs' partial termination claim, particularly in that the complaint does not specify what events the plaintiffs believe have triggered a partial termination. Martin further contends that, notwithstanding the infrequency and complexity of partial termination claims, administrative exhaustion nonetheless performs a useful function by facilitating the development of a factual record, providing a potentially nonadversarial forum for claims settlement, and weeding out frivolous claims before they enter the courts.

The procedural posture of Kennedy suggests that while a showing of exhaustion or futility is needed, it is not a technical pleadings requirement, but implicates fact-dependent issues. See *Kennedy*, 989 F.2d at 590, 592 (where the court converted a motion to dismiss on exhaustion grounds to a motion for summary judgment in order to consider material exterior to the complaint). It would therefore be imprudent for the court to decide the exhaustion and futility issues at the motion to dismiss stage. Accordingly, the motion to dismiss Count II on exhaustion grounds is denied without prejudice to renew as a motion for summary judgment following discovery.

Finally, defendants argue that they had no duty to allocate the surplus assets, even if there was a partial termination. This, however, is more appropriately addressed as a question of remedy that need not be reached at this time. Accordingly, plaintiffs may proceed with Count II insofar

as they may have the opportunity to show that there was a partial termination based on the alleged layoffs, and that exhaustion of administrative remedies was futile.

Count III: Failure to Prudently Invest Plan Assets Solely in the Interest of Plan Participants

The complaint further alleges that as part of the transfer negotiations, GE and Martin caused the trustees of the Plan to segregate one billion dollars in Plan assets, and to invest these assets in low-yield United States Treasury bills. Plaintiffs argue that this investment decision, which defendant Martin contends was made for ease of transfer, constitutes a breach of fiduciary duty to prudently invest. In response, Martin argues that it cannot be held liable for a breach of fiduciary duty for the investment of assets until such time as they legally had the authority to invest those assets.

As defined by 29 U.S.C. § 1002(21), a fiduciary is one who "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." A "person may be an ERISA fiduciary with respect to certain matters but not others," *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987), but in regard to control of assets, one can only be held responsible for those matters over which one has legal control. The complaint alleges, however, that "Lockheed Martin exercised management or control over assets of the GE Pension Plan and was a fiduciary-in-fact of the GE Pension Plan within the meaning of Section 2(21)(A) of

ERISA, 29 U.S.C. § 1002(21)(A)." Amended Complaint, P21. Construing all reasonable inferences in the plaintiffs' favor, the court views this allegation as attributing actual control over the plan assets to Martin. In addition, even in the absence of an actual fiduciary relationship, Martin could still be held liable for knowingly participating in an ERISA fiduciary's breach of duty. "One who knowingly participates in an ERISA fiduciary's breach of duty is jointly and severally liable with the fiduciary for resulting damages under ERISA." *Diduck v. Kaszycki*, 974 F.2d 270, 281 (2d Cir. 1992). Martin's Motion to Dismiss Count III is DENIED.

Count IV: Failure to Continue Accrued Benefits Under ERISA

It is not disputed that effective after January 1, 1995, defendant Martin eliminated the SERO and PCPO retirement benefits. Plaintiffs contend that this constitutes a violation of 29 U.S.C. § 1054(g) and 26 U.S.C. § 411(d)(6) as a failure to continue accrued benefits. Defendant Martin counters that the SERO and PCPO plans cannot be considered to have accrued to the plaintiffs because the plans by their terms had to be renewed periodically. The plaintiffs do not dispute that the plans contained natural expiration dates, and that they had to be renewed, but argue that because GE regularly and consistently renewed the plans, renewal was a mere formality, and plan beneficiaries reasonably expected the benefits to be always available.

It is true that the timing of receipt of most benefits, such as retirement benefits, is contingent upon some event taking place, such as reaching a certain age, or accruing certain years

of service. However, entitlement to these future benefits vests before an employee reaches the triggering event qualifying him or her to receipt. ERISA was "enacted for the purpose of assuring employees that they would not be deprived of their reasonably-anticipated pension benefits; an employer was to be prevented from 'pulling the rug out from under' promised retirement benefits upon which his employees had relied during their long years of service." *Amato v. Western Union Intern., Inc.*, 773 F.2d 1402 (2d Cir. 1985). Section 1054(g) provides that:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . .
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of —
>
> > (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> >
> > (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. . . .

29 U.S.C. § 1054(g). This provision of ERISA is intended to prevent employers from making their pension plans into "works in progress" such that any time an employee is approaching the stage at which a benefit is due to him or her, the plan changes and the benefit disappears. "When Congress enacted ERISA it 'wanted to . . . make sure that if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — he will actually receive it.' " *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S. Ct. 1783, 1788, 135 L. Ed. 2d 153 (1996) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 64 L. Ed. 2d 354, 100 S. Ct. 1723 (1980)). The case at hand, however, is not a case in which an accrued benefit was simply suspended. Rather, the SERO and PCPO benefits were contingent both upon certain events occurring (length of service, age, a plant closing) and a continual periodic renewal. There is a difference between an employer suspending the SERO and PCPO benefits before the natural expirations dates and simply choosing not to renew. In the former case, an employee could more readily argue that the benefit of SERO and PCPO had accrued during the time that the plans had been in effect. In the latter case, once the plans expired, the benefits ceased to accrue.

Nothing in ERISA "requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S. Ct. at 1788. Although GE's repeated renewal of its plans may have led some beneficiaries to relax their guard in evaluating the Martin plan, it nonetheless remained a benefit that periodically expired and had to be affirmatively renewed.

Therefore, defendant Martin's Motion to Dismiss Count IV is GRANTED.

Conclusion

For the foregoing reasons, defendant Martin's Motion to Dismiss [Doc. 146] is GRANTED in part and DENIED in part. Specifically, plaintiffs may proceed with Count I (failure to provide clear and adequate information), Count II (failure to allocate surplus assets and vest benefits upon partial termination), and Count III (failure to prudently invest) against defendant Martin in accordance with the delimitations set forth in this ruling. Defendant Martin is entitled to dismissal of Count IV (failure to continue accrued benefits).

GE defendants Motion to Dismiss [Doc. 148] is DENIED.

IT IS SO ORDERED.

Janet Bond Arterton
United States District Judge.

Dated at New Haven, Connecticut this 30th day of September, 1997.

## APPENDIX D — TRANSCRIPT OF ORAL RULING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED SEPTEMBER 26, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Case No. 3:93 CV 516

WILLIAM FLANIGAN ET AL

Plaintiff,

VS.

GENERAL ELECTRIC CORPORATION, ET AL

Defendant.

SEPTEMBER 26, 1996

BEFORE:

THE HON. JANET BOND ARTERTON, U.S.D.J.

* * *

[138] THE COURT: The present case arises from the sale of GE's aerospace division to Martin Marietta Corporation in 1993. In connection with the sale, GE agreed to transfer approximately 30,000 employees to Martin and to cause the GE pension plan to transfer their pension benefits to a newly created Martin pension plan. Both the old and

new plans were defined-benefit plans. The GE plan endeavored to transfer sufficient assets to the new plan to fund the accrued benefits that the transferred employees had earned while employed at GE.

There is no dispute that sufficient funds were transferred to satisfy such accrued obligations. However, the plaintiffs, former employees of the GE aerospace business, object to numerous aspects of the pension transaction, particularly disposition of the pension "surplus", that is, the residual assets held by the Plan above and beyond that which was actuarially necessary to pay accrued benefits. GE, Martin and the individual defendants, who are officials of the two corporate defendants, have moved to dismiss the complaint.

"In reviewing a complaint for dismissal under Rule 12(b)(6), the court must accept the [139] material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiffs favor. The complaint may be dismissed only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hernandez v Coughlin* 18 F.3d 133 at 136, Second Circuit, citations omitted. So that in deciding this motion to dismiss for failure to state a claim, "the issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence in support of the claims. Indeed, it may appear on the face of the pleading that a recovery is very remote and unlikely, but that is not the test." That's from *Scheuer v Rhodes*, 416 U.S. 232, 236 (1974).

Count I, breach of statutory duties. Count I alleges violations by the GE defendants on several provisions of

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ERISA: Section 403 regarding unlawful inurement, Section 406 regarding prohibited transactions, Section 404 regarding general fiduciary duty. Count I further alleges that Martin is liable as a knowing participant in these transactions.

All of the claims in Count I, save for one, are premised solely on GE's statutory duties as [140] opposed to duties created by the Plan. The single exception is the claim that GE violated its 404 fiduciary duties by not adhering to an alleged Plan requirement that Plan participants be allowed to remain in the plan notwithstanding a Plan spinoff. Because this claim assumes that the Plan contains such a requirement, this claim will be evaluated in the context of Count II.

The remaining claims in count I essentially challenge on general statutory claims the fact of the Plan spinoff or the amount of the assets transferred. However, the transaction at issue is governed by a specific statutory provision, Section 208 of ERISA, which provides as follows: A pension plan may not merge or consolidate with, or transfer assets or liabilities to, any other plan unless each participant in the plan would, if the plan then terminated, receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit immediately after the merger, consolidation or transfer, if the plan had been terminated.

Numerous circuits have held satisfaction of 208 relieves the employer of further obligations in the context of a merger or transfer. See, for [141] instance, *Blaw Knox Retirement Plan v White Consolidated Industries*, 998 F.2d 1185 at 1190 (3d Cir. 1993) stating, "compliance with ERISA's provisions

for the funding of merged, transferred or acquired plans as set forth in 29 U.S.C. Section 1058, which is ERISA 208, precludes a finding that a fiduciary breach occurred." Also, *Bigger v. American Commercial Lines* 862 F.3d 1341 at 1348, (8th Cir. 1988); *Dougherty v Chrysler Motors Corp.* 840 F.2d 2 at 4, (6th Cir. 1988) 1988.

In *Bigger* the Eighth Circuit presented this reasoning: The minimum standards of ERISA present delicate balancing by Congress between protecting the interests of participants and recognizing the legitimate needs of employers in such a way that employers will continue to establish and maintain pension plans. Section 208 reflects that balance. It simultaneously provides a safe harbor for employers, while fully protecting the benefits earned by participants prior to a spinoff. The exclusive benefit rule was not meant to award windfalls to spinoff plans that spun off employees did not earn and had no reasonable basis for expecting. 862 F.2d at 1348.

Although it has has not fully yet [142] addressed this issue, the Second Circuit has cited *Bigger* approvingly for the proposition that "208 represents Congress's attempt to clarify what conduct satisfies the fiduciary standards in the context of transferring plan assets." *John Blair Communications versus Telemundo Group*, 26 F.3d 360, 367, (2d Cir 1994).

As no authority rejecting the *Bigger* line of cases has come to the Court's attention, the Court holds that GE's statutory duties in the decisions at issue, that is, a decision to transfer assets to a new plan and the decision as to the

amount transferred, are limited to the requirements set forth in Section 208. Because Count IV alleges a violation of the requirements of 208, further analysis of the claims set forth in Count I must be made in the context of discussion of Count IV.

Count II, failure to comply with plan requirements. Plaintiffs argue that a provision of the summary plan description gave GE plan participants the unconditional right to remain participants notwithstanding the discontinuation of their employment with GE. The provision on which the plaintiffs focus provides for "special protection for long-service employees" in the event [143] of "transfer to successor employer." Qualified employees are instructed "if they leave their contribution in the plan" then they are eligible to receive certain pension benefits from GE based on years of service. The plaintiffs argue that the phrase "if you leave your contributions in the plan" creates a categorical right for participants to retain participant status.

In response, GE argues that the plaintiffs read too much into a single phrase in the SPD. GE observes that leaving contributions in the plan is set forth as a condition, not a right. The provision in question does not specify under what circumstances participants may leave contributions in the plan, and says nothing about GE's rights when an employee is not only transferred to a successor employer, but GE's pension obligations to the employee are also transferred. GE argues that the "special protection for long-term employees" provision in no way limits the SPD's "plan termination" provision which states that GE "reserves the right to end or amend the plans, in whole or in part, subject to collective

bargaining agreements, at anytime and for any reason. A plan change may transfer plan assets and debts to another [144] plan or split a plan into two other more parts."

In addition to the dispute over the interpretations of the SPD, the parties have also vigorously argued about the relationship of the SPD to the official plan documents, whether provisions in the Plan documents may be read to override any rights established in the SPD for Plan participants to remain in the Plan, and the legal status of a 1991 amendment to the Plan. However, the Court finds it unnecessary to reach any of these issues because the court does not believe that the SPD may be read in the manner plaintiffs wish it to be read.

Although the section of the SPD captioned "special protection for long-service employees", on which the plaintiffs rely, could be arguably said to be ambiguous standing on its own, under the general principles of contract interpretation, "A writing is to be interpreted as a whole." Restatement (second) of Contracts, Section 202(2).

The "plan termination" provision in the SPD on which GE relies, is clear and unequivocal; GE intended to reserve for itself the right to transfer plan assets and debts to a new plan. Thus, when reading the "special protection" provision in [145] conjunction with the "plan termination" provision, the Court finds, as a matter of law, that the SPD does not create a right for plan participants to remain in the Plan notwithstanding the Plan's spinoff. Therefore, the defendants are entitled to dismissal of Count II and that aspect of Count I which is derivative of the claims asserted in Count II.

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Count III, failure to provide clear and complete information. Plaintiffs allege that GE and Martin jointly compared statements pertaining to the benefits that would be available under the new Martin plan, but that this information was not complete or accurate. Plaintiffs further allege that defendants failed to provide complete and non-misleading information in response to specific inquiries from plan participants. In defendants motion to dismiss, GE treats Count III as derivative of Count II, that is, GE assumes that the alleged incorrect or incomplete statements pertained to plaintiffs' rights to remain under the Plan. GE does not dispute that it is obligated under ERISA to provide non-misleading information to Plan participants; rather, GE argues that if Count II is dismissed, Count III must be as well, because the [146] only information at issue in Count III pertains to the rights asserted in Count II. However, as made clear in colloquy with counsel and in argument today, Count III is not clearly as limited in scope as GE claims or previously perceived. Therefore, the Court cannot conclude that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hernandez* 18 F.3d at 136.

GE presents two additional arguments supporting dismissal of Count III. First, GE argues that the relief sought in Count III, reinstatement and appropriate "financial adjustments" for certain employees who allegedly retired early because of uncertainty over their benefits, is not available under ERISA. While it's true compensatory and punitive damages would not be available to the plaintiffs, under *Mertens versus Hewitt Associates* 113 Supreme Court, S.Ct. 2063 at 2068, (1993), the Court does have broad powers

of equitable relief under ERISA, Section 502(a)(3), including restitution and reinstatement, *Howe v Varity Corp* 36 F.3d 746 at 756, (8th Cir. 1994), which was affirmed by the Supreme Court at 1065, (1996). Resolution of the precise contours of relief that would be [147] available under Count III is inappropriate at the motion to dismiss stage.

Second, GE claims that plaintiffs do not have standing to bring Count III because they did not take advantage of the eight-week "window" to remain in the GE plan that was provided subsequent to the transfer. The plaintiffs respond that several members of the class had already resigned or retired in reliance on misinformation from the defendants prior to learning about the window. At a minimum, the plaintiffs have presented a factual dispute that would render GE's standing claim unsuitable for resolution at this time. As the Court has previously stated, the plaintiffs have standing to sue under ERISA when they can "show entitlement to Plan benefits, absent the plan administrator's wrongful conduct." *Mullins v. Pfizer*, 899 F. Supp. 69, at 75. The Court finds the plaintiffs have sufficiently alleged such a claim to survive a motion to dismiss.

Martin presents an alternative basis for dismissal of Count III as to itself. However, because the complaint alleges only events that occurred prior to the closing of the Martin-GE transaction, necessarily so, as the complaint was [148] filed prior to the closing Martin claims it had no fiduciary obligations to the plaintiffs and thus cannot be held liable for any interest or inaccurate interest information it provided. However, in the absence of a better factual record, as the court held in *Mullins*, "this court does not accept

a sterile demarcation as to when fiduciary duties may begin, the determination as to whether defendants fiduciary duties arose and whether they were properly discharged, cannot be ascertained as a matter of law on the face of the pleadings."

Next, Martin argues that because standing to sue under ERISA is limited to "participants," "beneficiaries," "fiduciaries", and the Secretary of Labor, ERISA Section 502(a), plaintiffs have no standing in the present case because the case was filed before the plaintiffs became participants in any Martin plan. However, this position may read, but it is not concluded that they do, too rigidity into ERISA's standing requirements. The Supreme Court has articulated a flexible definition of "participant" under ERISA, encompassing not just present participants, but also employees "reasonably expected to be in currently covered employment" and to "former employees who have a reasonable [149] expectation of returning to covered employment or who have a colorable claim to vested benefits." *Firestone Tire & Rubber Co. v. Bruch* 489 U.S. 101 at 117, (1989). Although this definition does not expressly encompass the plaintiffs in the present case, the Court is persuaded it is in the spirit *Bruch* to extend the definition of "plan participant" to employees whose transfer to a new plan is imminent and reasonably expected pursuant to a nearly-completed transaction.

In reaching this conclusion, the Court is mindful of the arguments raised by the plaintiffs that a contrary holding might deprive plaintiffs in similar cases from obtaining injunctive relief to prevent consummation of transactions that would violate ERISA.

Furthermore, if plaintiffs did not have standing to sue Martin at the time the present suit was filed, they surely have standing now. The Court sees little benefit in dismissing the claims against Martin in the present suit when the plaintiffs could simply reinstitute a new suit at a later date.

Accordingly, the motions to dismiss Count III are denied as to Martin. They're denied without prejudice to renew after an amended complaint is [150] filed.

Count IV, failure to allocate plan assets. In Count IV the plaintiffs argue that the amount of the plan surplus transferred to the new Martin plan did not reflect an appropriate pro rata division of the surplus between old and new plans. Plaintiffs argue such a pro rata division is required by Section 208 of ERISA and by provisions of the Plan that duplicate the requirements of 208. Count IV also repeats the allegations of violations of other statutory duties that essentially restates the allegations set forth in Count I. However, for the reasons set forth in the earlier discussion of Count I, the Court finds that the liability of the defendants turns solely on whether the transfer of assets to the new Martin plan complied with of Section 208. Although the issue is a close one, the Court concludes that plaintiffs fail to state a valid claim for relief in Count IV because they have not alleged that the assets transferred were insufficient to cover accrued benefits.

The case law is clear that as a general matter, in the context of a defined benefit plan, participants are not entitled to residual assets under Section 208. *John Blair* 26 F.3d at 366. In [151] affirming this proposition, the Third Circuit

recently articulated a distinction under ERISA between "benefit" as used in 208 and "asset": When Congress protected participant "benefits" in the context of a transfer, Congress only intended to protect "accrued benefits." *Malia v General Electric* 23 F.3d 828 at 831 (1994). In reaching this conclusion, the *Malia* court looked to the Seventh Circuit's analysis of property interests in a defined-benefit plan. A defined-benefit plan gives current and former employees property interests in their pension benefits, but not in the assets held by the trust. If the investments appreciate, the plan need not devote that increase to improving benefits; it may retain the surplus as a cushion against the day when yields decrease, or the employer may cease making contributions and allow the surplus to erode as liabilities continue to increase. *Johnson v Georgia Pacific Corp.*, 19 F.3d 1184, (7th Cir. 1994).

Plaintiffs do not dispute that participants are generally not entitled to residual assets under Section 208, but argue that the present case is distinguishable from the precedents because the GE Plan prohibited reversion of assets to GE in [152] the event of plan termination. Plaintiffs assert that because of this provision participants would have received a distribution of residual assets if there were a termination. Therefore, plaintiffs conclude, in the unique circumstances of a plan with a no-reversion clause, as here, Section 208 requires transfer or distribution of a pro rata share of residual assets.

Plaintiffs have pointed to no cases in which the plan participants were provided a distribution of residual assets based on the fact that a plan had a no-reversion provision.

Moreover, the fact of a no-reversion clause would plainly not alter the analysis of *Malia*, which the Court finds persuasive. In particular, the *Malia* court noted that Section 208 requires the participants be provided with "benefit" equivalence; that is, participants must be able to receive at least the same "benefits" in the event of a plan termination immediately following a transfer that they would have in a pre-transfer termination. Section 4044 of ERISA governing asset allocation in the event of termination, provides clearly different allocation mechanisms for "benefits", Section 4044(a), and "residual assets", Section 4044(d). Had Congress [153] intended for Section 208 to protect the stake of participants in residual assets, Congress could easily have used the distinctions and terminology recognized in Section to 4044. However, Congress merely provided for the protection of "benefits". Perhaps Congress did so in light of the tenuous nature of participants' interest in residual assets, see *Johnson* 19 F.3d at 1189-90, or out of a desire to preserve employer flexibility so as to encourage creation of pension plans. See *Siskind v Sperry Retirement Program* 47 F.3d 498 at 505 (1995). Whatever the reason, the Court does not believe that Section 208 was intended to require a pro rata distribution of residual assets, even when the transferring plan sponsor is prohibited from reclaiming residual assets itself.

In so holding, the Court notes that there is no allegation in the present case that GE transferred any of the residual assets to itself. The plaintiffs claim that GE used the plan assets for its own benefit is a different matter than an allegation of theft and is unavailing. Although some plan participants may be in a better position post transfer than

others, the Court does not see how GE has been enriched at the expense of all plan [154] participants as a class.

Moreover, because accrued benefits have been protected in the transfer, the most any participants have lost as a result is a certain cushion, a cushion that could unquestionably be spent down and eroded by an employer over time, and the speculative rights to surplus in the event of plan termination. The Court also notes that no-reversion clause themselves are subject to amendment, 29 U.S.C. Section 1344(d)(2)(a). *See Parrett v. American Ship Building*, 990 F.2d at 854, (5th Cir. 1993), which lends an additional level of contingency to the interests of plan participants in residual assets. The dispute over whether the plan by its terms precluded this amendment permitted under statute or whether GE waived its statutory right to amend by the plan language need not be resolved for the purposes of disposition of this motion to dismiss.

While the impact of *Kinek v Paramount Communications, Inc.* 22 F.3d 503 (1994) on the present set of allegations is not entirely clear, the Court is persuaded, under the better reading of *Kinek*, the case is inapposite. In *Kinek*, the Second Circuit held a plan provision similar to 208 should [155] be read such that plan participants would be "entitled, in the event of a spinoff, to what they should have received in the event of an actual termination", at 511. The result of this holding was that the defendant employer was required, at the time of the plan spinoff, to base its calculation of what benefits would have been due participants on another plan provision guaranteeing full payment of accrued benefits. Thus, despite the language that participants should get "what

they should have received in the event of an actual termination", the effect of *Kinek* was merely to protect the accrued benefits of participants. In this light, *Kinek* is compatible with the reasoning of *Malia*: The purpose of 208 is to protect accrued benefits, not interests in residual assets. Moreover, it bears note that *Kinek* was interpreting a plan provision, and expressly declined to interpret 208 itself. *Kinek* at 510 n.4.

Because the court is convinced by reasoning of *Malia*, and does not find *Kinek* or any other authority compels a different result, the Court finds the plaintiffs have not properly alleged a violation of 208. Therefore, Count IV and the related aspect of Count I are dismissed.

[156] Count V, partial plan termination. Under Section 411(d)(3) of the Internal Revenue Code, certain plans must provide that upon "partial termination the rights of all affected employees to benefits accrued to the date of such partial termination, to the extent funded as of such date, are nonforfeitable." Plaintiffs argue that the transfer of plan assets and liabilities to Martin amounts to a partial plan termination, allegedly entitling them to become vested in both all accrued benefits and a pro rata share of surplus assets.

Although "partial termination" is not defined under ERISA, the House and the Senate reports state "examples of a partial termination might include, under certain circumstances, a large reduction in the work force or sizeable reduction in benefits under the plan." H.R. Rep. No. 807 93rd Congress, 2d Session, quoted in *Weil v. Retirement Plan Administrative Committee* 933 F.2d 106 at 109, (2d. Cir 1991).

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Treasury regulations define partial termination for tax purposes as follows: Whether or not a partial termination of a qualified plan occurs, and the time of such event, shall be determined by the Commissioner with regard to all of [157] the facts and circumstances of a particular case. Such facts and circumstances include: The exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan. Treasury Regulation 1.411(d)-(2)(1) (1997.), *quoted in Weil* 933 F.2d at 109.

The partial termination rule is triggered in these circumstances "to prevent forfeiture of pension benefits that have not yet vested and to prevent a windfall to the employer through a reversion of money on which the employer has paid no federal income taxes." *In re Gulf Pension Litigation*, 764 F.Supp. 1149 at 1165, Southern District of Texas, 1991.

Plaintiffs' partial plan termination claim is predicated not on layoffs or benefit reductions, but on transfers of participants from one plan to another. In their briefs, the plaintiffs assert that subsequent to the closing of the GE-Martin deal and the filing of this suit, Martin did, in fact, lay off a substantial number of former GE employees. However, if the plaintiffs wish to add [158] these allegations to Count V, they will need to amend their complaint. The plaintiffs have cited no cases in which the transfers have been viewed as relevant to the partial termination calculus, and plaintiffs do not argue to the contrary in oral argument today. However, at least two courts have rejected the

plaintiffs' theory. *In re Gulf Pension Litigation*, and *Halliburton Company v Commissioner* 100 Tax Court, 216 at 239 (1993), affirmed by the Fifth Circuit, 25 F.3d 1043, cert. denied 115 S.Ct 486 (1994).

The Court finds the logic of *Gulf Pension* and *Halliburton* persuasive. Holding that a plan spinoff complying with the requirements of 208 could constitute a partial termination would advance neither of the purposes of the partial termination rule: The accrued benefits of participants are protected by Section 208 and the employer has gained no windfall through the reversion of tax-free earnings. The same interests that are advanced by 411(d)(3) in the context of benefit reductions and true work force reductions are advanced by Section 208 in the context of plan mergers and spinoffs. Extending the provisions of 411(d)(3) to mergers and spinoffs would represent, at best, a redundancy, [159] and, at worse, a serious threat to the "delicate balancing" of employer and employee interests that Congress established in Section 208. See *Bigger* at 1348.

Therefore, the Court find that plaintiffs have failed to allege a violation of Section 411(d)(3), and Count V is dismissed.

On the count misinvestment of plan assets, the plaintiffs have alleged that the defendants breached their fiduciary duties by investing $1 billion dollars of plan assets in low-yield 90-day Treasury bills in order to facilitate the transfer of assets from GE to Martin. The plaintiffs allege that the defendant could have invested the funds in equally convenient vehicles with much more higher rates of return.

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GE argues that it was permitted to take matters such as liquidity and risk into account in its investment decisions, rather than merely rate of return. This assertion is no doubt correct, but does not necessarily mean that the plaintiffs have not stated a claim for which relief can be granted. Plaintiffs have alleged that, even in light of the full range of permissible concerns, the defendants misinvested plan assets. In the absence of any [160] bright-line rule that investments in 90-day T-bills is per se prudent, which GE has not establish, a fuller factual record is necessary to evaluate plaintiffs' claim.

GE also claims that count six is "frivolous" because the case involves an overfunded defined benefit plan, so misinvestment of assets would have at worse resulted in a reduction of surplus. However, GE cannot seriously argue that the existence of a plan surplus removes its duty of loyalty and care. Although plan sponsors may indirectly dissipate plan surpluses by declining to make fresh contributions as new liabilities accrue, there is no support in the case law for the proposition that sponsors may ever waste assets or fail to make investment decisions in the best interests of beneficiaries. "ERISA establishes both a duty of loyalty and the duty of care. The Act's legislative history indicates that the crucible of congressional concern was the misuse and mismanagement of plan assets." *Lowen v Tower Asset Management, Inc.* 829 F.2d 1209 at 1213, (2d Cir. 1987). Quoting *Mass. Mutual v Russel*, 473 U.S. 134 at 141 n.8 (1985).

Count VII, failure to continue accrued [161] benefits. Count VII is directed solely against the Martin defendants

and concerns plaintiffs' expectations of what Martin would do following completion of the transfer of plans assets. Because subsequent events have rendered Count VII as pled substantially out of date, the Court does not believe it will be fruitful to rule on Count VII in its current form. Accordingly, the motion to dismiss Count VII is denied without prejudice to renew its claims or any others that are encompassed by an amendment to the complaint. Concurrently, the Court grants permission for the plaintiffs to amend their complaint to not only bring it up-to-date, but to reflect the Court's decisions today.

For the foregoing reasons, the motion to dismiss of the Martin defendants, docket number four, is granted with respect to counts I, IV and V, and denied without prejudice to renew following the plaintiffs' amended complaint with respect to counts III, VI and VII. The motion of the GE defendants to dismiss is granted with respect to counts I, II, IV and V and denied with respect to counts III and VI.

It is so ordered.

* * * *

## APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 8, 2001

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos: 00-7569(L)/00-7570(CON)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of June two thousand one.

Flanigan, et al.,

Appellants

v

General Electric Co., et al.,

Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Flanigan, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

**FOR THE COURT**

ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

## APPENDIX F — RELEVANT STATUTES

**Employee Retirement Income Security Act of 1974, as amended:**

**29 U.S.C. § 1002. Definitions**

For purposes of this title:

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

*Appendix F*

## 29 U.S.C. § 1054. Benefit accrual requirements

* * *

(g) Decrease of accrued benefits through amendment of plan.

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) or 4281.

(2) For purposes of paragraph (1), a plan amendment which has the effect of —

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities

for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any —

(A) tax credit employee stock ownership plan (as defined in section 409(a) of the Internal Revenue Code of 1986), or

(B) employee stock ownership plan (as defined in section 4975(e)(7) of such Code),

shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

**29 U.S.C. § 1104. Fiduciary duties**

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

*Appendix F*

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

*Appendix F*

**29 U.S.C. § 1106. Prohibited transactions**

(a) Transactions between plan and party in interest. Except as provided in section 408:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a).

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a).

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.